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No. 01-___

In The

Supreme Court of the United States

SHASTA COUNTY, a public entity; BRAD McDONALD, an individual; and D. COMPOMIZZO, an individual,

Petitioners,

v.

THOMAS BREWSTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *McMillian v. Monroe County*, 520 U.S. 781 (1997), this Court concluded that a County Sheriff enjoys Eleventh Amendment immunity when acting on behalf of the State. However, unlike federal law enforcement officers which lack jurisdiction to investigate and process violations of State law, County Sheriffs investigate and process violations of both State law and County ordinances.

Has the Ninth Circuit eviscerated this Court's decision in *McMillian* by holding that law enforcement officers are ***not*** entitled to Eleventh Amendment immunity, even where the officers are engaged in the investigation of a violation of State law, if they are formally employed by a local government entity rather than the State itself?

2. In *McMillian*, this Court held that the determination whether local law enforcement officers are entitled to Eleventh Amendment immunity depended on the role these officers filled as defined by state law. The State of California has determined that all three pillars of the California criminal justice system – District Attorneys, County Sheriffs, and Superior Court Judges – are acting for the state, and therefore enjoy Eleventh Amendment immunity, when presiding over, prosecuting, or investigating violations of State law.

Has the Ninth Circuit circumvented this Court's decision in *McMillian* by rejecting California's analysis of its own law, and instead concluding that law enforcement officers are ***not*** entitled to Eleventh Amendment immunity, even where they investigate violations of State law if they happen to be employed by a local government agency rather than the State itself?

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellants below):

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CITATIONS FOR OPINIONS BELOW

The opinion of the Court of Appeals (Appendix [App.] 1-17) is reported at 275 F.3d 803 (9th Cir. 2001). The opinion of the District Court (App. 18-29) is reported at 112 F.Supp.2d 1185 (E.D. Cal. 2000). The order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* (App. 30) and the final judgment (App. 31-32) were not reported.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its opinion on December 28, 2001. The Court denied the petitioner's petition for rehearing and suggestion for rehearing *en banc* on February 6, 2002. 28 U.S.C. § 1254(q) confers jurisdiction on this Court to review on a writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by respondent pursuant to 42 U.S.C. § 1983, which at the time this action was filed read as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity or other proper proceeding for redress. The purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The respondent alleges that the petitioners deprived him of rights secured by the Fourth and Fourteenth Amendments, the relevant parts of which read as follows:

FOURTH AMENDMENT: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

FOURTEENTH AMENDMENT (Section 1): "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Overview of the Case

This case arises out of a criminal investigation following a murder and sexual assault in a small rural

county in California. After remaining unsolved for a period of 10 years, the Shasta County Sheriff's Department developed new information which indicated that plaintiff THOMAS BREWSTER was the perpetrator. Upon a proper showing, an arrest warrant was issued (Excerpts of Record on Appeal [ER] 52) and BREWSTER was charged with murder. Thereafter, following a preliminary hearing, a neutral magistrate determined there was probable cause to hold BREWSTER to answer on the charge of murder. (ER 27.)

However, during the course of the trial, DNA evidence was discovered which established that semen found on the victim's clothing did not belong to BREWSTER. In light of this new exculpatory evidence, the District Attorney immediately moved to dismiss all charges against BREWSTER.

BREWSTER responded by filing suit in the United States District Court for the Eastern District of California on November 3, 1998, alleging violation of civil rights, defamation, negligence, negligent and intentional infliction of emotional distress, and false imprisonment. (ER 1-13.)

Petitioners filed a motion for summary judgment alleging that California sheriffs represent the state and not the county when they effectuate arrests and investigate crimes, and, therefore, enjoy Eleventh Amendment immunity from suit under 42 U.S.C. § 1983.

The District Court denied the motion for summary judgment based on Eleventh Amendment immunity, but certified the case for interlocutory appeal. (App. 18-29.) The Ninth Circuit affirmed the denial of summary judgment (App. 1-17), denied the petition for rehearing, and

rejected the petitioners' suggestion for rehearing *en banc* (App. 30).

The Underlying Facts

On December 14, 1984, eighteen-year-old Terry Arndt was shot to death while he and his high-school girlfriend, Sherri Gillaspey, sat in his parents' car on a secluded road near the small mountain town of Burney, California. After murdering Mr. Arndt, the assailant sexually assaulted Ms. Gillaspey, then fled the scene. The initial homicide investigation produced no significant leads and the case sat dormant for ten years.

Late in 1994, the Shasta County Sheriff's Department reactivated the case. Two new detectives, petitioners herein, were assigned to the case and commenced an exhaustive year-long investigation. This investigation revealed the following evidence: BREWSTER matched the description of the suspect, both facially and physically, and looked strikingly similar to the composite drawing made by the trained police artist. BREWSTER admitted being in the town of Burney on the night of the murder, was familiar with the area in which the crime occurred, had engaged in target practice in the vicinity, and was known to use and carry weapons in his vehicles. (ER 16-18.) BREWSTER also made comments to multiple individuals in which he implicated himself in the Arndt murder. (ER 23-24.) Ms. Gillaspey indicated that she believed the assailant was driving a 1970's model Camaro similar to one BREWSTER owned. (ER 21.) Ms. Gillaspey identified BREWSTER as a possible suspect from a photo line up and again from a live line up. Ms. Gillaspey said that BREWSTER sounded "exactly like" the perpetrator.

Finally, BREWSTER had a history of violent crime, forced rape and oral copulation of women, and the killing and mutilation of live animals. (ER 24-25, 50-51.)

Following this investigation, the detectives submitted their evidence to the District Attorney, who, after reviewing the evidence, made the decision to charge BREWSTER with the murder of Terry Arndt. On December 14, 1995, the Honorable Richard McEachen signed a warrant authorizing the arrest of BREWSTER, who was confined at Folsom State Prison based on a parole violation arising out of a 1994 conviction for a violation of California *Penal Code*, § 12021(a), possession of a firearm by an ex-felon. Thereafter, following a preliminary hearing, a neutral magistrate determined there was probable cause to hold BREWSTER to answer on the murder charge. (ER 27.)

However, during the course of the trial, DNA evidence was discovered which established that semen found on Ms. Gillaspey's clothing did not belong to BREWSTER. In light of this new exculpatory evidence, the District Attorney immediately moved to dismiss all charges against BREWSTER.

The Procedural History

BREWSTER filed suit in the United States District Court for the Eastern District of California on November 3, 1998, alleging violation of civil rights, defamation, negligence, negligent and intentional infliction of emotional distress, and false imprisonment. (ER 1-13.) In this complaint, BREWSTER alleged the detectives presented false and misleading evidence to the District Attorney in an attempt to secure a conviction they knew was false.

Petitioners filed a motion for summary judgment alleging that California sheriffs represent the state and not the county when they effectuate arrests and investigate crimes, and, therefore the Eleventh Amendment bars any claims made under 42 U.S.C. § 1983, based on this Court's ruling in *McMillian v. Monroe County, Alabama*, 520 U.S. 781 (1997).

On September 21, 2000, the District Court denied the motion for summary judgment based on Eleventh Amendment immunity. (App. 18-29.) However, at that time, the District Court certified the case for interlocutory appeal.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. On December 29, 2001, the Court affirmed the denial of summary judgment. (App. 1-17.) On February 6, 2002, the Court denied the petition for rehearing and rejected the petitioners' suggestion for rehearing *en banc*. (App. 30.)

REASONS FOR GRANTING CERTIORARI

In *McMillian v. Monroe County*, 520 U.S. at 793, this Court concluded that a County Sheriff enjoys Eleventh Amendment immunity when acting on behalf of the State. In reaching this conclusion, the Court held that in determining whether a sheriff is an agent of the state, the federal district court's analysis *must be governed by state law*. *Id.* at 786 ("[W]hether a particular official has final policymaking authority is a question of *state* law," quoting *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989), internal quotations omitted, emphasis in original).

Applying *McMillian*, the State of California has determined that District Attorneys, County Sheriffs, and Superior Court Judges all enjoy Eleventh Amendment immunity based on their respective involvement in the California criminal justice system. *Pitts v. County of Kern*, 17 Cal.4th 340, 70 Cal.Rptr.2d 823 (1998) [California district attorneys act as agents of the state of California in formulating policies and procedures related to their official functions]; *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998) [Sheriffs act on behalf of the State of California when they formulate policies and procedures for the release of prisoners from custody]; *Frost v. Geernaert*, 200 Cal.App.3d 1104, 1107-1108, 246 Cal.Rptr. 440 (1988) [superior court judges are entitled to immunity].

Moreover, the Ninth Circuit has endorsed California's view with respect to District Attorneys and Superior Court Judges. *Weiner v. San Diego County*, 210 F.3d 1025 (9th Cir. 2000) [district attorneys are immune from § 1983 claims]; *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987) [state courts and judges are immune from § 1983 claims]. However, in *Brewster*, the Ninth Circuit broke with this line of cases and rejected the State of California's determination that County Sheriffs are entitled to Eleventh Amendment immunity. So, as the law now stands, only Sheriffs are denied Eleventh Amendment immunity and only in federal court.

Unlike federal law enforcement officers who have jurisdiction to investigate and process only violations of federal law but not State or local law, County Sheriffs investigate and process violations of both State law and County ordinances. Indeed, in many, if not most criminal

cases, the violations committed, and the investigations resulting therefrom, are based entirely on State law and not the violation of a local County ordinance. Thus, even though employees of all three agencies are technically employees of the individual counties, the State of California has determined that prosecutors, sheriffs, and judges all act as agents of the State when prosecuting, investigating, or presiding over violations of the State penal code. The State of California has a strong interest in the uniform enforcement of its laws across all 58 counties. It effectuates that interest by making District Attorneys, County Sheriffs, and Superior Court Judges its agents.

In light of the determination by the State of California that all three pillars of the criminal justice system – District Attorneys, County Sheriffs, and Superior Court Judges – all act as its agents when engaged in their respective roles in the criminal justice system, the *Brewster* opinion's focus on the local component of a County Sheriff, while overlooking the Sheriff's larger role in the California criminal justice system, is misplaced. *Brewster* completely eviscerates the *McMillian* rule that County agencies should enjoy Eleventh Amendment immunity when acting as an agent of the State.

Given this, Eleventh Amendment immunity should not be denied where a criminal investigation and prosecution are based entirely on a violation of State law merely because the investigating agency consists of locally employed peace officers. Such a rule would require a State to establish a parallel law enforcement structure merely to protect its right to Eleventh Amendment immunity where its agents are involved in legitimate State law enforcement functions. Surely this could not have been the intent of this Court when it issued the

McMillian opinion. The *Brewster* opinion, therefore, is a radical and dangerous departure from well-established principles, violates notions of state sovereignty, and is in conflict with prior authority from this Court, the Ninth Circuit, and the California Supreme Court.

The Ninth Circuit should not cavalierly disregard the State of California's determination that all three pillars of the criminal justice system function as agents of this State in fulfilling their roles in the criminal justice system. As this Court has recognized, "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *see also Martinez v. Gomez*, 137 F.3d 1124, 1126 (9th Cir. 1998) ("[O]ur role is to determine what California law is, not what it should be").

If *Brewster* is allowed to survive, any former criminal defendant will be able to maintain a Section 1983 cause of action against a local Sheriff in any situation in which he or she is acquitted of the underlying charge, even where a neutral magistrate has determined that probable cause exists to support the prosecution. Such a rule would have a chilling effect on law enforcement and its ability to function as an independent arm of the State, an essential component in the California criminal justice system.

By publishing an opinion about California law which contradicts State law as decided by California courts, the Ninth Circuit has ensured that questions of county liability and governmental immunity will be determined differently depending on the forum selected by plaintiffs. California state courts are bound by state law that Eleventh Amendment immunity applies; district courts in

California will be bound by *Brewster*. This means that the result in a given case will depend on whether a plaintiff files his or her Section 1983 claims in state or federal court. This Court should intervene in this action to prevent these conflicting outcomes, to protect issues of state sovereignty, and to reduce the problems associated with federal forum shopping. Indeed, if such a prophylactic step is not taken, a sudden rush to file Section 1983 claims in federal court will occur as lawyers attempt to avoid potential malpractice issues associated with the filing of Section 1983 cases in state court in the face of adverse California law. Thus, the *Brewster* opinion would effectively deprive California of its right to concurrent jurisdiction over Section 1983 claims.

Worse yet, *Brewster* appears to be the latest attempt by the Ninth Circuit to limit the availability of governmental immunity defenses. Given that *Brewster* has denied Eleventh Amendment immunity for law enforcement officers who investigate violations of state crime, can the denial of immunity for District Attorneys who prosecute state crime be far behind, since they too are technically employed by the County?[1] Then, after immunity is denied for two of the three pillars of the California criminal justice system, will limitations on judicial immunity be forthcoming? *Brewster* is not, and cannot be, consistent with this Court's view of Eleventh Amendment immunity. It represents an unwarranted departure from the spirit of *McMillian* which will only serve to expand baseless federal litigation.

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[1] Indeed, this issue is currently pending before the Ninth Circuit *en banc* in *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (9th Cir. 2002).

Certiorari, therefore, is necessary to resolve these important federal questions, which conflict with prior United States Supreme Court precedent, Ninth Circuit precedent, and the well-settled view of the California Supreme Court. United States Supreme Court Rule 10.

LEGAL ARGUMENT

I. SINCE COUNTY SHERIFFS ARE ACTING AS AGENTS OF THE STATE WHEN INVESTIGATING VIOLATIONS OF STATE LAW, THEY ENJOY ELEVENTH AMENDMENT IMMUNITY, EVEN THOUGH THERE IS A LOCAL COMPONENT TO THE COUNTY SHERIFF'S DEPARTMENT

A. Under *McMillian*, The Determination Of Who Works For The State Of California Is An Issue Of State Law

In *McMillian v. Monroe County*, 520 U.S. 781 (1997), this Court provided an analytical framework for determining whether a government official represents the state government or a local governmental entity in performing certain functions. In that case, the plaintiff sued Monroe County and numerous county officials under Section 1983 for allegedly unconstitutional actions taken by the Monroe County Sheriff. *Id.* at 783. This Court held that the county could not be liable under Section 1983 based on the policies of its sheriff because the sheriff acts as a policymaker for the state, not the county. *Id.* at 793.

Beginning its analysis by noting that the characterization of the sheriff as a policymaker for the state rather than the county would not necessarily hold true for every

type of official action in which the sheriff engages, this Court opined that the relevant inquiry is "whether government officials are final policymakers for the local government in a particular area, or on a particular issue." *Id.* at 785.

Finally, this Court observed that "whether a particular official has final policymaking authority is a question of *state* law." *Id.* at 786, quoting *Jett v. Dallas Independent School Dist.*, 491 U.S. at 737, internal quotations omitted, emphasis in original. Accordingly, the Court in *McMillian* reviewed Alabama's constitution, statutes, and case law to determine that an Alabama County Sheriff was a state official for purposes of Section 1983 liability: "Alabama sheriffs, **when executing their law enforcement duties**, represent the State of Alabama, not their counties." *Id.* at 787-93, emphasis added.

B. The State Of California Has Determined That District Attorneys, Sheriffs And Judges Are Agents Of The State In Fulfilling Their Roles In The Criminal Justice System

The determination of whether a person is a state policymaker or a county policymaker is an issue of state law. *McMillian*, 520 U.S. at 786. This court, therefore, looks to California law to decide whether the Los Angeles County Sheriff is a state policymaker or a county policymaker. *See, e.g., Johnson v. Fankell*, 520 U.S. at 916 ["Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state."]; *see also Martinez v. Gomez*, 137 F.3d at 1126

["[O]ur role is to determine what the California law is, not what it should be."].

Applying *McMillian*, the State of California has determined who acts as agents for it in the context of its criminal justice system. California's constitution, long-standing statutes and recent interpretations of those statutes, establish that district attorneys, sheriffs, and judges work for the state, not the county, in setting policies for their respective offices in regard to the criminal justice system. All three groups of independently elected public officials, therefore, are immune from suit under Section 1983. *Pitts*, 17 Cal.4th at 340 [California district attorneys act as agents of the state of California in formulating policies and procedures related to their official functions]; *Peters*, 68 Cal.App.4th at 1166 [Sheriffs act on behalf of the State of California when they formulate policies and procedures for the release of prisoners from custody]; *Frost*, 200 Cal.App.3d at 1107-1108 [superior court judges are entitled to immunity].

C. The Federal Courts Have Adopted California's View That Judges And District Attorneys Enjoy Immunity

The Ninth Circuit has endorsed California's view with respect to District Attorneys and Superior Court Judges. *Weiner v. San Diego County*, 210 F.3d at 1025 [district attorneys are immune from 1983 claims]; *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d at 1110 [state courts and judges are immune from 1983 claims].

In *Weiner*, the Ninth Circuit followed *Pitts'* analysis of California law with regard to District Attorneys, and

held that county district attorneys, when deciding whether to prosecute an alleged offender, act as state officials rather than county officials. *Id.* at 1032.

The *Weiner* Court noted that "[i]n addition to California's constitutional and statutory law, we also consider its case law, giving due respect to decisions by the California Supreme Court as the ultimate interpreter of California state law." *Id.* at 1030. In concluding that a district attorney is a state officer when deciding whether to prosecute an individual, the Court gave deference to the fact that "[a]ll relevant California cases, including *Pitts*, have held that district attorneys are state officers for the purpose of investigating and proceeding with criminal prosecutions." *Id.*

Similarly, in *Zolin*, the Ninth Circuit adopted the view that the California Superior Courts were entitled to Eleventh Amendment immunity, stating:

> "Although the County does pay most of the Superior Court's bills, state case law and constitutional provisions make clear that the Court is a State agency. [Citations.] The official name of the court is the Superior Court of the State of California; its geographical location within any particular county cannot change the fact that the court derives its powers from the State and is ultimately regulated by the State. . . . We conclude that a suit against the Superior Court is a suit against the State, barred by the eleventh amendment." *Zolin*, 812 F.2d at 1110.

Thus, not only has the State of California determined that all three components of the California criminal justice system act on its behalf, the Ninth Circuit has

endorsed this view with respect to two of the three agencies involved.

D. *Brewster* Is Contrary To The Holding And Spirit Of *McMillian, Zolin,* And *Weiner*

Notwithstanding these well-established principles, the Ninth Circuit has issued an opinion which is inconsistent with the holding and spirit of *McMillian, Zolin,* and *Weiner*. *Brewster*'s analysis, focusing on the minutiae of obscure statutory references, overlooks the obvious: When a law enforcement officer investigates a violation of a State penal code (as opposed to a County ordinance), he or she unquestionably is acting as an agent of the State, not the County.

Indeed, even though venue is in a local county, criminal prosecutions are undertaken in the name of the "People of the State of California." Similarly, the local county court in this case was denominated as the "Superior Court of the State of California." Inasmuch as the presiding over, and prosecution of, a criminal offense is a State function, by a parity of reasoning, so too must be any investigation preceding such a prosecution.

The devolution of the *Brewster* court's interpretation of *McMillian* – that an analysis of Eleventh Amendment immunity turns not on the function performed but on the title of agency performing the function – is unsound. Under *McMillian,* Eleventh Amendment immunity should not be denied where a criminal investigation and prosecution are based entirely on a violation of State law and not a County ordinance simply because the investigating agency is a County Sheriff. *Brewster* completely violates the letter and spirit of *McMillian,* by denying Eleventh

Amendment immunity based on the title of the investigating agency without regard to the function performed. Such a draconian adherence to form over substance is ill-advised in general and decidedly unwarranted in this case in particular.

E. *Brewster* Is Bad Law And Constitutes Bad Public Policy

Although *Brewster* attempts to resolve the various legal issues raised, the opinion actually creates more problems than it solves. Some of the areas implicated include violations of state sovereignty, expanded federal litigation and forum shopping, and the continuation of the Ninth Circuit's attempts to limit governmental immunity defenses.

1. *Brewster* Violates Fundamental Notions Of State Sovereignty

One of the most insidious results of *Brewster*'s analysis is the profound impact it has on state sovereignty. By circumventing California's own determination that the sheriff acts on the state's behalf, *Brewster* makes the federal courts the final arbiter of California law. This opinion is in direct conflict with *McMillian*'s proviso that "[s]tates have wide authority to set up their state and local governments as they wish." *McMillian*, 520 U.S. at 795.

Simply stated, the State of California should be able to determine which individuals or entities act on its behalf. The attempt to inject federal courts into a state's decision-making process regarding whether an individual acts on its behalf should not be taken lightly. This is

especially so where the California courts have held that a sheriff *is* a "state actor" in this context, and the Legislature has not taken any contrary action in response to this interpretation, thereby implicitly agreeing with it. Under these circumstances, the federal judiciary should not attempt to second-guess the State's legitimate determinations about the meaning of California law.

If *Brewster* is allowed to stand, it would require the State to engage in the idle act of establishing a parallel law enforcement structure merely to protect its right to Eleventh Amendment immunity where its agents are involved in legitimate State law enforcement functions. Surely this could not have been the intent of this Court when it issued the *McMillian* opinion.

2. *Brewster* Will Expand Federal Litigation And Increase Forum Shopping

By refusing to follow California law on this issue, *Brewster* guarantees that already over-worked federal judges will become even more burdened. Currently, many claims alleging violations of civil rights under 42 U.S.C. § 1983 are filed in state courts, where *Peters* is binding. The *Brewster* opinion, on the other hand, is binding upon all federal trial courts sitting in California. *See Jones-Hamilton v. Beaser Materials & Servs.*, 973 F.2d 688, 696 n. 4 (9th Cir. 1992). These contradictory approaches will increase confusion and inconsistent outcomes, which will now depend solely on whether the plaintiff files his or her action in state or federal court. Such an inconsistent application of law will result in "forum shopping" as savvy plaintiff's attorneys will opt to file their lawsuits in federal court to circumvent established California law,

increasing the caseload of an already over-burdened federal judiciary. Such a rush to file in federal court to avoid potential malpractice issues associated with the filing in state court will effectively deprive California of its right to concurrent jurisdiction over Section 1983 claims.

Worse yet, the district courts will not be alone in their sudden increase in activity. Because an immunity defense is subject to an interlocutory appeal pursuant to 28 U.S.C. § 1292, every adverse decision by a district court on that issue will be subject to immediate review by the Ninth Circuit. *See, e.g., Behrens v. Pelletier*, 516 U.S. 299, 309 (1996). Based on this procedural reality, as well as language in *McMillian* and *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir. 2001), which repeatedly calls for a "case by case" analysis of the issues presented, *McMillian*, 520 U.S. at 795; *Streit*, 236 F.3d at 560, 564 n. 13, the Ninth Circuit will become the *de facto* court of original jurisdiction for all civil rights cases involving sheriffs in the entire State of California.

3. *Brewster* Represents The Ninth Circuit's Latest Attempt To Limit The Scope Of Available Governmental Immunity Defenses

Finally, *Brewster* is symptomatic of a larger problem: the Ninth Circuit's concerted effort to limit the scope of available governmental immunity defenses. As such, *Brewster* constitutes nothing more than judicial legislation designed to further a political agenda.

For example, this Court recently reversed the Ninth Circuit's denial of governmental immunity in an excessive force case. *Saucier v. Katz*, 533 U.S. 194 (2001). In

Saucier, this Court reversed the denial of a qualified immunity defense where a plaintiff, who had suffered no physical injuries or arrest, alleged civil rights violations based on his forcible removal from a presidential campaign speech at the Presidio Army Base in San Francisco. In so holding, this Court held that the right which is allegedly violated "must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier*, 533 U.S. at 202, *citing Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In the legislative immunity context, this Court has held that "local legislators are . . . absolutely immune from suit under § 1983 for their legislative activities." In so holding, the Court noted that, "[a]bsolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.' " *Id.* at 54, quoting *Tenny v. Brandhove*, 341 U.S. 367, 376 (1951). This ruling is consistent with California's view of expansive immunity for local legislators. *See Caldwell v. Montoya*, 10 Cal.4th 972, 976, 42 Cal.Rptr.2d 842 (1995) ("[D]iscretionary act immunity extends to basic governmental policy decisions entrusted to broad official judgment. . . . *This immunity applies even where the dismissed official alleges that the members' votes were cast for reasons that violated FEHA.*" (Emphasis added, internal quotations and citations omitted)).

However, in *Navarro v. Block*, 250 F.3d 729 (9th Cir. 2001), the Ninth Circuit recently held that qualified immunity did not apply to a Section 1983 lawsuit against the board of supervisors which alleged that prior "bad

faith" votes to indemnify police officers for punitive damage awards in unrelated cases were the impetus behind alleged civil rights violations. Thus, not only was the issue of absolute immunity left unaddressed, the Ninth Circuit held that it was clearly established that local legislators were not entitled to qualified immunity if they voted to indemnify officers in "bad faith." *Id.* at 729. Such an attempt to limit the scope of available immunity defenses is in clear violation of the expanded notions of qualified immunity articulated by this Court in *Bogan* and illustrates the Ninth Circuit's concerted efforts to chip away at available immunity defenses in general.

Finally in *Brewster*, the Ninth Circuit is attempting to limit the scope of Eleventh Amendment immunity. However, this ruling is in direct conflict with *McMillian*, *Pitts*, and *Peters*. *See* Argument 2, *infra*. Like *Navarro* and *Saucier* before it, *Brewster* constitutes an attempt by the Ninth Circuit to inject the federal judiciary into the affairs of sovereign states by limiting the availability of immunity defenses. It cannot be allowed to survive.

Taken together, these three areas demonstrate that the Ninth Circuit's view of the viability of governmental immunity defenses is inconsistent with the view of this Court. *Brewster*'s attempt to advance a political agenda by way of judicial legislation is inappropriate and should not be ratified by this Court.

F. Conclusion

Applying *McMillian*, the State of California has determined that District Attorneys, Sheriffs and Judges all enjoy Eleventh Amendment immunity based on their role

of prosecuting, investigating, and presiding over violations of State law in the California criminal justice system. The Ninth Circuit's attempt to circumvent this State determination, as well as this Court's decision in *McMillian*, is contrary to binding United States Supreme Court precedent.

Brewster, therefore, represents a radical and dangerous departure from well-established principles, violates notions of state sovereignty, and is in conflict with prior authority from this Court, the Ninth Circuit, and the California Supreme Court. Moreover, it appears to be the latest attempt by the Ninth Circuit to engage in judicial legislation to advance a political agenda.

Certiorari, therefore, is necessary to resolve these important federal questions, which conflict with prior United States Supreme Court precedent, Ninth Circuit precedent, and the well-settled view of the California Supreme Court. United States Supreme Court Rule 10.

II. *BREWSTER'S* REJECTION OF THE STATE OF CALIFORNIA'S DETERMINATION THAT ALL THREE PILLARS OF THE CALIFORNIA CRIMINAL JUSTICE SYSTEM – DISTRICT ATTORNEYS, COUNTY SHERIFFS, AND SUPERIOR COURT JUDGES – ENJOY ELEVENTH AMENDMENT IMMUNITY EVISCERATES THE HOLDING AND SPIRIT OF *McMILLIAN*

A. The State Of California Has Determined That All Three Pillars Of The California Criminal Justice System Enjoy Eleventh Amendment Immunity

In *McMillian*, this Court concluded that a County Sheriff enjoys Eleventh Amendment immunity when

acting on behalf of the State. In reaching this conclusion, the Court held that in determining whether a sheriff is an agent of the state, the federal district court's analysis *must be governed by state law. McMillian*, 520 U.S. at 786. As discussed herein, the State of California has applied such immunity to District Attorneys, County Sheriffs and Superior Court Judges.

1. *Pitts* Applies *McMillian* To California District Attorneys, Holding They Are Protected By Eleventh Amendment Immunity

One year after *McMillian*, the California Supreme Court was presented with a similar question in *Pitts*, 17 Cal.4th at 340. In *Pitts*, the California Supreme Court analyzed California law in order to determine whether a district attorney was a state official for purposes of Section 1983 liability while acting in his prosecutorial capacity. *Id.* at 356-362. The California Supreme Court concluded that a district attorney acts on behalf of the State of California rather than for the county that comprises his jurisdiction when undertaking various law enforcement functions such as prosecuting violations of criminal law as well as training and supervising staff in these areas. *Id.* at 362.

Following *McMillian*, the California Supreme Court analyzed the relevant provisions of the California Constitution and the California Code. Based on a review of those statutes, the California Supreme Court concluded that district attorneys act as final policymakers on behalf of the State of California because they are primarily controlled and supervised by the California Attorney General and are subject to very limited control by the county

board of supervisors in undertaking their law enforcement duties. *Id.* at 361.

In arriving at its decision, the California Supreme Court acknowledged that the district attorney was not designated as a state official by either the California Constitution or *Government Code*, § 24000. Thus, the labels in the California Constitution and *Government Code*, § 24000 are neither controlling nor dispositive on the question of whether an individual is a state official. *Id.* at 361. Instead, the *Pitts* court relied largely on the fact that the district attorney was under the supervision of the California Attorney General, who is designated as a state official in the California Constitution, at Article V, Section 13. *Id.* at 356-58.

Like this Court in *McMillian*, the California Supreme Court acknowledged that certain provisions weighed in favor of the conclusion that the district attorney was a county policymaker. *Pitts*, 17 Cal.4th at 359-360. However, those provisions were not sufficient to overcome the other provisions of California law which more firmly supported the conclusion that a district attorney acted on behalf of the State of California in undertaking certain law enforcement duties. The Court stated, for example, that the fact that a California county has the ability to set a salary for an employee does not translate into control over him. *Id.* at 355.

2. *Peters* Follows *McMillian* And *Pitts*, Holding A County Sheriff Is Immune From Suit

In 1998, following *McMillian* and *Pitts*, the California Court of Appeal concluded that "in establishing policies for the release of persons from a county jail, a sheriff acts

as a state official, not a policymaker for the county." *Peters*, 68 Cal.App.4th at 1166. The *Peters* court relied on the fact that "identical provisions governing California district attorneys, considered in *Pitts*, also apply to California sheriffs." *Id.* at 1174.

In doing so, the Court relied heavily on several statutes regarding district attorneys that contain language that is identical to statutes applying to sheriffs. *Compare, e.g.*, California *Government Code*, § 12550 ("The Attorney General has direct supervision over the district attorneys of the several counties . . . ") *with Government Code*, § 12560 ("The Attorney General has direct supervision over the sheriffs of the several counties . . . ").

Similarly, the *Peters* court explained that "in *Pitts*, the court noted that boards of supervisors have no direct control over how district attorneys perform their law enforcement function. The same analysis holds true for sheriffs." *Id.* at 1175-76, *citing Government Code*, § 25303 and *Brandt v. Board of Supervisors*, 84 Cal.App.3d 598, 147 Cal.Rptr. 468 (1978).

Furthermore, with respect to countervailing provisions of California law, the *Peters* court explained:

> "As in *McMillian* and *Pitts*, various other provisions could be cited in support of the argument that the sheriff should be considered a county official for the purpose of the county's liability under section 1983. . . . These provisions were considered in *Pitts, supra*, 17 Cal.4th at pages 360-361, as they related to district attorneys, and were found not to outweigh other provisions treating district attorneys as state officers. **Similarly here, these formal designations of sheriffs as county officials are outweighed by the**

> **functional independence of sheriffs from control by county boards of supervisors in performing their law enforcement functions.**" *Id.* at 1176, emphasis added.

Although the Sheriffs are elected County officers, Article V, § 13 of the California Constitution and California *Government Code*, §§ 12560 and 12524 clearly establish that the Attorney General is empowered with the authority to review and control the law enforcement activities of the sheriffs. Specifically, Article V, § 13 provides:

> "The Attorney General shall have direct supervision over every district attorney and **sheriff** and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require of any said officers to make reports concerning the investigation, detection, prosecution and **punishment of crime** in their respective jurisdictions as to the Attorney General may seem advisable." CAL. CONST. ART. V, § 13.

3. Judges Also Are Protected By Eleventh Amendment Immunity From Section 1983 Claims

State court judges also are immune from 1983 claims. Both the Ninth Circuit and the California Courts have squarely decided in favor of Eleventh Amendment immunity from 1983 claims for state courts and judges despite local funding of these courts. *Zolin*, 812 F.2d at 1110; *Frost*, 200 Cal.App.3d at 1107-1108. Although the county pays most of the court's bills and the geographical location of the court may be within a particular county, the

Court did not find these facts dispositive. More importantly, in granting judges Eleventh Amendment immunity, the court focused on the fact that judges are appointed by the California Governor and their judicial duties are assigned by state statute.

Like judges and district attorneys who have Eleventh Amendment immunity, sheriffs hold an elected position. In addition, whenever any of these three offices becomes vacant between elections, the Governor appoints a replacement. Judges, district attorneys, and sheriffs are all independently elected public officials. It is therefore consistent with prior interpretations of the law that sheriffs have Eleventh Amendment immunity.

Furthermore, sheriffs, like judges and district attorneys, have statutorily designated investigative and prosecutorial functions. Judges and district attorneys derive their core duties from state statute and the California Constitution. They are deemed actors of the state for purposes of liability under Section 1983. Just as superior courts are controlled for statewide uniformity by appellate courts, Sheriffs and District Attorneys are controlled for statewide uniformity by the Attorney General. Therefore, it is logical that sheriffs, who also derive their functions from state statute and the California Constitution, have Eleventh Amendment immunity from claims under Section 1983.

B. The Ninth Circuit Is Attempting To Limit Eleventh Amendment Immunity

Brewster now joins *Streit* as the second published case issued by the Ninth Circuit in the last few months dealing

with the scope of Eleventh Amendment immunity. Surprising, these two cases are inconsistent with each other.

1. *Streit v. County Of Los Angeles*

In *Streit*, 236 F.3d at 564, the Ninth Circuit held that when the Sheriff over-detains a county jail prisoner to check for outstanding warrants, the Sheriff is performing an administrative, rather than law enforcement, function that is within the scope of his duties as an agent of the county. The over-detention claim in *Streit*, therefore, was not barred by Eleventh Amendment immunity.

The *Streit* Court noted that the determination of whether the Sheriff acts as an agent of the State of California or the County of Los Angeles is not an "all or nothing" decision. "Rather, [the Court is] to inquire 'whether government officials are final policymakers for the local government in a particular area or on a particular issue.' " *Id.* at 560, *citing McMillian*, 520 U.S. at 785. Thus, *Streit's* holding that the Sheriff is an agent of the county on its facts does not preclude findings that the Sheriff is an agent of the state in different contexts.

Streit asserted that *Peters* was distinguishable on its facts. *Id.* at 564. *Peters* held that the Sheriff was acting as an agent of the state in performing the law enforcement function of holding an individual in jail on a facially valid warrant that turned out to be for someone else. *Id.* at 563. *Streit* held that when the Sheriff over-detains a county jail prisoner to check for outstanding warrants, the Sheriff is performing an administrative function that is within the scope of his duties as an agent of the county. *Id.* at 564.

The Court in *Streit* went to great lengths to characterize the Sheriff's actions in that case as "administrative" rather than "law enforcement" in reaching its conclusion. *Id.* at 564. *Streit* noted that "[a]cting upon a warrant is a **law enforcement function** with which the Los Angeles Sheriff's Department is tasked under California state law." *Id.* However, "[s]earching for wants and holds that may or may not have been issued for a person whom the state has no legal right to detain is an **administrative function** of the jail operations for which the Los Angeles Sheriffs Department answers to the County." *Id.* The court reasoned, "**[a]lthough this distinction may be perceived as subtle, *for the purposes of our analysis, it is critical.*"** *Id.* emphasis added.

2. *Brewster v. County Of Shasta*

Seizing on the limits of this "subtle" yet "critical" distinction, the *Brewster* opinion attempts to sound the death knell to Eleventh Amendment immunity for local law enforcement officers. As early as the first footnote, the Ninth Circuit backtracked on the previous "subtle" yet "critical" language, stating, "We recognize that some language in *Streit* may be read to suggest that California sheriffs are state actors when acting in some of their law enforcement capacities. However, the sheriff's investigative function was not before the court in *Streit*." App. 4, fn. 1. Thereafter, the Court issued a new pronouncement: "It requires little extension of *Streit* for us to conclude that the Shasta County Sheriff acts for the County, not the state, when investigating crime in the County." App. 8.

This analysis, however, cannot withstand scrutiny. Unlike federal law enforcement officers, who lack jurisdiction to investigate and process violations of State or local law, County Sheriffs investigate and process violations of both State law and County ordinances. In fact, in many if not most such criminal cases, the violations committed, and the investigation resulting therefrom, are based entirely on State law and not the violation of a local County ordinance.

Under *McMillian*, the determination of Eleventh Amendment immunity should not turn solely on the issue of whether the investigating agency is the County Sheriff. Indeed, the dispositive issue should be whether the County Sheriff is acting on behalf of the State while conducting an investigation into a violation of a State penal code.

The Ninth Circuit should not cavalierly disregard the State of California's determination that all three pillars of the California criminal justice system function as agents of this State in the criminal justice system. By denying Eleventh Amendment immunity to the County Sheriffs, the three-legged stool that supports the California criminal justice system will soon topple.

If *Brewster* is allowed to survive, any former criminal defendant will be able to maintain a Section 1983 cause of action against a local Sheriff in any situation in which he or she is acquitted of the underlying charge, even where a neutral magistrate has determined that probable cause exists to support the prosecution. Such a rule would have a chilling effect on law enforcement and its ability to function as an independent arm of the State, an essential component in the California criminal justice system.

Given that *Brewster* has denied Eleventh Amendment immunity for law enforcement officers who investigate violations of state crime, can the denial of immunity for District Attorneys who prosecute state crime be far behind? *See* footnote 1, *supra.* Then, what assurances are there that the Ninth Circuit will not then set its sights on attempts to limit judicial immunity?

Certiorari, therefore, is necessary to resolve these important federal questions, which conflict with prior United States Supreme Court precedent, Ninth Circuit precedent, and the well-settled view of the California appellate courts. United States Supreme Court Rule 10.

CONCLUSION

For all the foregoing reasons, the petitioners urge the Court to grant this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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275 F.3d 803

United States Court of Appeals,

Ninth Circuit

Thomas **BREWSTER**, Plaintiff-Appellee,

v.

SHASTA COUNTY, a public entity; Brad McDannold, an individual; D. Compomizzo, an individual, Defendants-Appellants.

No. 01-15118.

Argued and Submitted July 9, 2001

Filed Dec. 28, 2001

John Hagar, Law Office of John Hagar, San Francisco, California, for the defendants-appellants.

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James H. Thebeau, Deputy County Counsel, Bakersfield, California, for amicus curiae California State Association of Counties.

Stephen Yagman, Yagman & Yagman & Reichmann, Venice Beach, California, for amicus curiae Yagman & Yagman & Reichmann.

Appeal from the United States District Court for the Eastern District of California; Lawrence K. Karlton, Chief District Judge, Presiding. D.C. No. CV-98-02157-LKK.

Before: HALL, WARDLAW, and BERZON, Circuit Judges.

HALL, Circuit Judge:

This case requires us to decide whether the Shasta County Sheriff's Department, when investigating crime, acts on behalf of the state of California or on behalf of Shasta County. If the sheriff is a county actor, Shasta County may be subject to liability under 42 U.S.C. § 1983 and *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), for the sheriff's constitutional torts. We conclude that the sheriff's department, when investigating crime, acts for the county, and therefore that the county is subject to section 1983 liability.

BACKGROUND

Appellee Thomas Brewster brought suit under 42 U.S.C. § 1983 against the County of Shasta and two Shasta County Sheriff's Department deputies. Appellee alleged that the deputies violated his civil rights during the investigation of a murder and sexual assault by manipulating a witness into giving a false identification, failing to test physical evidence, and ignoring exculpatory evidence. Appellee argued that the county is liable under *Monell* for his injuries caused by the deputies' execution of the Sheriff's policies on arrests and crime investigations because the Sheriff is a final policymaker for the county. Shasta County moved for summary judgment.

Relying on *McMillian v. Monroe County*, 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997), Shasta County argued that the Shasta County Sheriff functions as a state,

not a county, official when investigating crime, and therefore the county cannot be sued under section 1983 for the alleged constitutional torts of the sheriff. The district court concluded that a sheriff acts as a county official when investigating crime, and denied the County's motion for summary judgment. *Brewster v. County County* [sic] *of Shasta,* 112 F.Supp.2d 1185, 1191 (E.D.Cal.2000). The district court certified its order denying summary judgment for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On December 18, 2000, this court granted the County permission to appeal the order. *See* 28 U.S.C. § 1292(b).

DISCUSSION

A.

A county is subject to liability under 42 U.S.C. § 1983 if its policies, established by the county's lawmakers or "by those whose edicts or acts . . . may fairly be said to represent official policy," caused the constitutional violation at issue. *Monell,* 436 U.S. at 694, 98 S.Ct. 2018. The parties agree that the sheriff is the relevant policymaker. The question is whether he is a policymaker on behalf of the state or the county; if he is a policymaker for the state, then the county cannot be liable for his actions. *See, e.g., Streit v. County of Los Angeles,* 236 F.3d 552, 559 (9th Cir.), *cert. denied,* ___ U.S. ___, 122 S.Ct. 59, 151 L.Ed.2d 27 (2001). We review the district court's denial of the County's motion for summary judgment de novo. *Weiner v. San Diego County,* 210 F.3d 1025, 1028 (9th Cir.2000).

Our analysis is governed by the analytical framework set out in *McMillian v. Monroe County,* 520 U.S. 781, 117

S.Ct. 1734, 138 L.Ed.2d 1 (1997), in which the Supreme Court concluded that Alabama sheriffs act as policymakers for the state, not the county, when investigating crime. This court applied the *McMillian* analysis to California sheriffs in *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir.2001), to conclude that the Los Angeles County Sheriff acts as the final policymaker for the county when administering the county's policy for release from the local jails. *McMillian* instructs, however, that we must inquire "whether governmental officials are final policymakers for the local government in a particular area or on a particular issue." 520 U.S. at 785, 117 S.Ct. 1734. Our analysis in *Streit* thus does not resolve the question of Shasta County's liability in this case, because the sheriff's function of investigating crime was not at issue in *Streit*.[1] *McMillian* further instructs that although the question of county liability under section 1983 is a question of federal law, "our inquiry is dependent on an analysis of state law," including the state's constitution, statutes, and case law. *McMillian*, 520 U.S. at 786, 117 S.Ct. 1734. Thus, although *Streit* does not resolve the question presented in the instant case, the analysis of

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[1] We recognize that some language in *Streit* may be read to suggest that California sheriffs are state actors when acting in some of their law enforcement capacities. However, the sheriff's investigative function was not before the court in *Streit*. *McMillian* clearly instructs that determination of whether a sheriff is a state or county actor depends on an analysis of the precise function at issue, in this case, the sheriff's crime investigation function.

California law governing sheriffs already undertaken in *Streit* provides the starting point for our own analysis.[2]

B.

The question in *Streit* was whether a California sheriff, in administering the county's policy for release from county jails, acted for the county or the state. We began our analysis with an examination of the California Constitution, which identifies California sheriffs as county officials. Unlike the Alabama Constitution that the Supreme Court considered in *McMillian*, "the California Constitution does not list sheriffs as part of 'the state executive department.' " *Streit*, 236 F.3d at 561 (quoting *McMillian*, 520 U.S. at 787, 117 S.Ct. 1734) (internal quotation marks omitted). "Instead, Article XI, section 1(b) of the California Constitution designates sheriffs as county officers." *Id.* Further, "there is no provision in the California Constitution that states that the [sheriff] acts for the state when managing the local jails." *Id.*

We next determined that several provisions of the California Code support the conclusion that the sheriff acts for the county when administering the local jails.

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[2] The district court relied on our decision in *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir.1989). *Thompson*, which predates *McMillian*, does not control this case. *Thompson* dealt with the sheriff's responsibility to administer the county jails, not the sheriff's law enforcement responsibilities. Further, in *Thompson*, this court simply assumed that the sheriff was "the county official that state law indicates is the official policymaker regarding arrestee detention in County Jail." *Id.* at 1444. Whether the sheriff was acting for the state or the county in administering the county jails was not in dispute in *Thompson*.

Importantly, "[u]nder California law, monetary damages for section 1983 claims are paid by the County and not the state." *Id.* at 562 (citing Cal. Gov.Code § 815.2). This "crucial factor" weighed "heavily" toward our conclusion that the sheriff functioned for the county, rather than the state, when managing the local jails. *Id.* The Supreme Court explained in *McMillian* that it was "critical" for the case and "strong evidence in favor of the . . . conclusion that sheriffs act on behalf of the State" that a judgment against an Alabama sheriff would be a suit against the State, and that the county would not be liable for a sheriff's acts under *respondeat superior.* 520 U.S. at 789, 117 S.Ct. 1734; *see also Streit,* 236 F.3d at 562. Here, however, California law places liability on the county. Cal. Gov.Code § 815.2; *Streit,* 236 F.3d at 562.

Further, California Government Code section 25303 grants the county boards of supervisors broad fiscal and administrative powers for the management of county jails. *Streit,* 236 F.3d at 561. Under California Government Code section 23013, the counties also "retain the power to transfer control of a county jail from the sheriff to a county-created department of corrections." *Id.* The California Code also provides that California sheriffs are elected county officers. *Id.* at 562 (citing Cal. Gov.Code § 24000(b); Cal. Elec.Code § 314). Sheriffs are required to maintain their offices at the county seat with other county officers. *Id.* (citing Cal. Gov.Code § 24250). Sheriff vacancies are filled in the same manner as other elective county officers. *Id.* (citing Cal. Gov.Code § 24205). The services of the sheriff may be contracted out by the county – not the state. *Id.* (citing Cal. Gov.Code § 53069.8). We found that "[t]hese various state provisions lead inexorably to the

conclusion that the [sheriff] is tied to the County in its political, administrative, and fiscal capacities." *Id.*

Finally, we examined California case law and concluded that the relevant cases further supported our holding that the county was liable for the sheriff's actions. *Id.* at 562-63 (discussing *Sullivan v. County of Los Angeles*, 527 P.2d 865, 868-69 (Cal.1974) (holding that the county was liable for the sheriff's failure to release a prisoner who had completed a sentence), and *Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 251 Cal.Rptr. 444 (1988) (holding that control over the local prisons is within the authority of the individual counties)). We rejected the county's reliance on *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998), in which the California Court of Appeal held that the Los Angeles Sheriff's Department was a state actor and therefore immune from section 1983 liability. We noted that the cases presented distinct factual scenarios. *Streit*, 236 F.3d at 564. Moreover, we explained that we were not bound by the conclusion of the California Court of Appeal in *Peters*, because the question regarding section 1983 liability ultimately implicated federal, not state, law. *Id.* Our examination of "the precise function at issue in conjunction with the state constitution, codes, and case law" led us to "conclude that the [sheriff] acts as the final policymaker for the county when administering the County's release policy." *Id.* at 564-65, 80 Cal.Rptr.2d 860.

C.

It requires little extension of *Streit* for us to conclude that the Shasta County Sheriff acts for the County, not the state, when investigating crime in the county. As we explained in *Streit*, the California Constitution clearly identifies the sheriff as a county officer. *Streit*, 236 F.3d at 561 (citing Cal. Const. art. XI, § 1(b)). That designation is not limited to the sheriff's function of managing the county jails.Moreover, as in *Streit*, nothing in California's constitution provides that the sheriff acts for the state instead of the county when investigating crime.

The same statutory provisions identified in *Streit* to "lead inexorably to the conclusion that the [sheriff] is tied to the County in its political, administrative, and fiscal capacities," *Streit*, 236 F.3d at 562, apply equally to sheriffs investigating crime. As *Streit* explained, the fact that "monetary damages for section 1983 claims are paid by the County and not the state . . . weighs heavily" in favor of concluding that the sheriff acts for the county. *Id.* (citing Cal. Gov.Code § 815.2). California Government Code section 815.2 is not limited to the sheriff's jail administration function. Amicus California State Association of Counties argues that because the county's obligation to indemnify and defend sheriffs is required by *state* statute for all local employees, the payment obligation does not indicate that the sheriff acts for the county. Yet the fact that the state legislature has determined that *all* county officials are to be indemnified by the county government – including the sheriff and the sheriff's department employees, and without exception for their crime investigation functions – indicates that the sheriff is considered a county actor.

Further, unlike in *McMillian*, where Alabama sheriffs were required to attend all courts in the state, California sheriffs are required to attend only those courts within their respective counties. Cal Gov.Code § 26603. We also note that unlike in *McMillian*, in which the Alabama Constitution made a county sheriff subject to impeachment on the authority of the Alabama Supreme Court, not the county, 520 U.S. at 788, 117 S.Ct. 1734, impeachment proceedings against a California county sheriff, as with other county officials, are initiated by a county grand jury, and the sheriff is not included among those officials identified in the California Constitution as subject to impeachment by the state Legislature. *See* Cal. Const. art. IV, § 18; Cal. Gov.Code § 3060; *People v. Hulburt*, 75 Cal.App.3d 404, 142 Cal.Rptr. 190, 193 (1977). While this factor may be of somewhat limited weight because a state court appoints the prosecutor to conduct the impeachment proceedings, *see Weiner*, 210 F.3d at 1030, it nonetheless weighs toward the conclusion that the sheriff acts for the county when investigating crime as well as when administering the jails. Finally, as we noted in *Streit*, California Government Code section 25303 grants the county board of supervisors supervisory authority over all county officers, including sheriffs, and places a duty on the board of supervisors to "see that [county officers] faithfully perform their duties." Cal. Gov.Code § 25303; *see also Dibb v. County of San Diego*, 884 P.2d 1003, 1009 (in bank [sic]) (holding that "under section 25303, the board of supervisors has a statutory duty to supervise the conduct of all county officers").

Only one provision of the California Constitution offers support for the County's position. Article V, section

13, of the California Constitution, places California sheriffs under the "direct supervision" of the Attorney General. Cal. Const. art. V, § 13.[3] Article V, section 13, is given shape in several statutory provisions that give the Attorney General specific supervisory powers over sheriffs. *See* Cal. Gov.Code § 12560 (giving the Attorney General the power to require written reports concerning the investigation, detection, and punishment of crime in the county); Cal. Gov.Code § 12561 (giving the Attorney General the power to appoint persons to perform the duties of sheriffs with respect to the investigation of a particular crime); Cal. Gov.Code § 12524 (giving the Attorney General the power to call a conference of district attorneys, sheriffs, and police chiefs for the purpose of furthering "uniform and adequate enforcement" of state law). Further, California law limits the general supervisory authority of the county board of supervisors over the sheriff by providing that the board of supervisors "shall not obstruct the investigative function of the sheriff." Cal.

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[3] Cal. Const. Art. V, § 13, provides in part:

> Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. . . .

Gov.Code § 25303. The County argues that because the sheriff is subject to supervision by the Attorney General, the sheriff acts as a state, not a county, official when investigating crime.

As the district court for the Northern District of California astutely observed in *Roe v. County of Lake*, 107 F.Supp.2d 1146 (N.D.Cal.2000), such reliance on Article V, section 13, "would prove too much, as the California Constitution permits the Attorney General to supervise all 'other law enforcement officers as may be designated by law.' " *Id.* at 1150-51 (quoting Cal. Const. art. V, § 13). On its face, Article V, section 13, applies to *all* law enforcement officers in California. The California Supreme Court has explained that the purpose of Article V, section 13, "was to ease the difficulty of solving crimes, and arresting responsible criminals, by coordinating county law enforcement agencies and providing the necessary supervision by the Attorney General over them." *Pitts v. County of Kern*, 17 Cal.4th 340, 70 Cal.Rptr.2d 823, 949 P.2d 920, 931 n. 4 (1998). Article V, section 13 thus is a tool that aids the Attorney General in carrying out his duty "to see that the laws of the State are uniformly and adequately enforced." Cal. Const. art. V, § 13. Such general law enforcement authority "does not contemplate absolute control and direction" of the officials subject to the Attorney General's supervision. *People v. Brophy*, 120 P.2d 946, 953 (Cal.Ct.App.1942). On the contrary, sheriffs retain significant autonomy as the officials responsible for investigating crime within their respective counties. *See id.* Moreover, as recently as 1978, the California Constitution was amended to expressly require each county to have "an elected county sheriff." Cal. Const. art. XI,

§ 1. This history stands in sharp contrast to Alabama's history, found "especially important" in *McMillian*, of amending its constitution to place its sheriffs within the state executive department. *See* 520 U.S. at 787, 117 S.Ct. 1734.

The County also argues that because California Government Code section 25303 prohibits a county board of supervisors from obstructing the investigative function of the sheriff, the statute demonstrates that the sheriff is a state, not a county, actor when investigating crime. *See* Cal. Gov.Code § 25303 ("The board of supervisors shall not obstruct the investigative function of the sheriff of the county. . . . "). We disagree. On its face, the limitation in section 25303 appears to be directed at preserving the independence of the sheriff from political pressure. *See id.* ("This section shall not be construed to affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney of a county."). The provision thus is akin to a separation of powers provision, and as such has no obvious bearing on whether the sheriff should be understood to act for the state or the county when investigating crime within his county. Merely because a county official exercises certain functions independently of other political entities within the county does not mean that he does not act *for* the county.

Moreover, although the county board of supervisors may not *obstruct* the sheriff's investigative function, it does not follow that the county has no interest in how the sheriff performs his investigative duties. In *Dibb*, the California Supreme Court held that under California

Government Code section 25303, a county board of supervisors "has a statutory duty to supervise the conduct of all county officers," including county sheriffs, and that under California Government Code section 31000.1, the board of supervisors was authorized to establish a citizen review board to review and report on the conduct of the sheriff's department. *Dibb*, 884 P.2d at 1009. Although section 25303 prohibits the board from *obstructing* the sheriff's investigation of crime, the board nonetheless maintains a substantial interest in the performance of the sheriff's department, including the conduct of its officers when investigating crime.[4] *Id.*

We recognize that in *Weiner*, this court found Article V, section 13, of the California Constitution and the limitation on the board of supervisor's authority in California Government Code section 25303, as applied to California district attorneys, to weigh in favor of the conclusion that district attorneys act for the State when deciding to prosecute a case. 210 F.3d at 1030; *accord Pitts*,

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[4] By way of illustration, the court explained:

> Review of citizen complaints and peace officer-related deaths might suggest the need for new or different types of training for personnel . . . which the board of supervisors would have to fund. Politically the board of supervisors might be concerned about public distrust of investigations conducted by either the sheriff or district attorney and hopeful that investigations by a group not aligned with law enforcement would restore public confidence, particularly if that group reached conclusions consistent with the sheriff and district attorney.

Dibb, 36 Cal.Rptr.2d 55, 884 P.2d at 1008 (internal quotations and alterations omitted).

70 Cal.Rptr.2d at 834, 949 P.2d 920. However, Article V, section 13, establishes a closer relationship between the Attorney General and district attorneys than between the Attorney General and county sheriffs. Under Article V, section 13, "whenever 'in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute,' in which cases 'he shall have all the powers of a district attorney.' " *Brophy*, 120 P.2d at 953 (quoting Cal. Const. art. V, § 13). No similar provision permits the Attorney General to assume the powers of a sheriff. Similarly, the *Weiner* court found the limitation in section 25303 to support the conclusion that district attorneys act for the state when deciding to prosecute crime only by reading section 25303 in conjunction with California Government Code section 12550, which, like Article V, section 13, of the California Constitution, provides that the Attorney General may assist the district attorney or even take full charge of any investigation or prosecution, in which case the Attorney General would have all the powers of a district attorney. *See Weiner*, 210 F.3d at 1029-30. There is no analogous provision with respect to a sheriff's investigative function that would permit the Attorney General to assume the powers and responsibilities of the sheriff. *Compare* Cal. Gov.Code § 12560. Indeed, California courts have recognized that Article V, section 13, generally does not permit county officials to "avoid or evade the duties and responsibilities of their respective offices by permitting a substitution of judgment." *Brophy*, 120 P.2d at 953. The only recognized exception is that which provides for the Attorney General's assumption of the district attorney's duties. *Id.*

The County also argues that because California law imposes on sheriffs the duty to "preserve peace," Cal. Gov.Code § 26600; arrest "all persons who attempt to commit or who have committed a public offense," Cal. Gov.Code § 26601; and "prevent and suppress any affrays, breaches of the peace, riots, and insurrections . . . , and investigate public offenses which have been committed," Cal. Gov.Code § 26602, the sheriff is a state actor when investigating crime. In *McMillian*, it was important to the Court's analysis that Alabama sheriffs were given "complete authority to enforce the state criminal law in their counties" while the county boards of supervisors had no authority regarding law enforcement. 520 U.S. at 790, 117 S.Ct. 1734. Unlike in Alabama, however, in California, county boards of supervisors have authority to supervise the conduct of sheriffs, including their law enforcement conduct, subject to the limitation that the board not obstruct the sheriff's investigation of crime. *See Dibb*, 884 P.2d at 1008.

Additionally, we are satisfied that California case law supports our conclusion that California sheriffs are county actors when investigating crime. We have found no California case holding that sheriffs are state actors when investigating crime. Indeed, as we noted in *Streit*, our own court has long assumed that sheriffs act on behalf of the county, even when investigating crime. *See* 236 F.3d at 564. We are not bound by the determination of the California Court of Appeal in *Peters* that California sheriffs are state actors. *See id.* Questions regarding section 1983 liability implicate federal, not state, law, and the sheriff's investigative function was not at issue in *Peters*. *Id.* Further, as we explained above, California counties

maintain a significant interest in supervising the sheriff's performance of his investigative function, and there are significant differences in the law governing district attorneys and the law governing sheriffs.

California courts have noted that only the sheriff can control how he spends the funds allotted to him in the county budget, and that the county cannot withhold the funds necessary for the sheriff to carry out his duties. *See Brandt v. Madera County Bd. of Supervisors*, 84 Cal.App.3d 598, 147 Cal.Rptr. 468, 471 (1978); *Hicks v. Orange County Bd. of Supervisors*, 69 Cal.App.3d 228, 138 Cal.Rptr. 101, 108 (1977). In *McMillian*, the Supreme Court placed little weight on the source of the sheriff's funding because control over the sheriff's budget permitted the county only an "attenuated and indirect influence" over the sheriff. 520 U.S. at 791-92, 117 S.Ct. 1734. Unlike in *McMillian*, however, the county also sets the sheriff's salary in California, thus permitting the board of supervisors to exercise a somewhat more direct influence over the sheriff. *See* Cal. Gov.Code § 25300; *compare McMillian*, 520 U.S. at 791, 117 S.Ct. 1734 (noting that the Alabama sheriff's salary is set by the state legislature, not the local governing body). While the county's similar authority to set the district attorney's salary "does not translate into control over him," *Weiner*, 210 F.3d at 1030 (quoting *Pitts*, 70 Cal.Rptr. 2d 823, 949 P.2d at 937(internal quotation marks omitted)), it provides one more factor weighing in favor of the conclusion demonstrating that the sheriff is a county actor when investigating crime.

CONCLUSION

In sum, we conclude that the Shasta County Sheriff acts as a final policymaker for the County when investigating crime within the County. We therefore affirm the district court's holding that the County may be subject to liability under 42 U.S.C. § 1983.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THOMAS BREWSTER,

Plaintiff,

v.

COUNTY OF SHASTA, a public entity; SHASTA COUNTY SHERIFF'S DEPARTMENT, a public entity; BRAD McDANNOLD, an individual; D. COMPOMIZZO, an individual; CALIFORNIA DEPARTMENT OF JUSTICE, a public entity,

Defendants.

_____/

NO. CIV. S-98-2157 LKK/PAN

ORDER

TO BE PUBLISHED

(Filed Sep. 21, 2000)

Plaintiff sues the County of Shasta and two deputies of the Shasta County Sheriff's Department alleging various violations of his constitutional rights. He argues that the County of Shasta is liable for injuries caused by the execution of the Shasta County Sheriff's policies concerning suspect arrests and crime investigations because the Sheriff is a final policymaker for County. *See Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978). The County moves for summary judgment and contends that California sheriffs represent the state and not the county when they effectuate arrests and investigate crimes, and thus the County cannot be held liable under 42 U.S.C. § 1983 for plaintiff's alleged injuries. Below, I resolve that

claim.[1] As I now explain, however, the law relative to this issue is less than pellucid.

It is established that states are not amenable to suit under § 1983. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). It is equally well established, however, that county governments and their law enforcement agencies may be sued for damages under the Civil Rights Act of 1871. *See Monell*, 436 U.S. at 690; *Anthony v. County of Sacramento*, 898 F. Supp. 1435, 1451 (E.D. Cal. 1995).

While a county may be sued under § 1983, it is not liable "solely because it employs a tortfeasor. . . . " *Monell*, 436 U.S. at 691. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to present official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694. Because the county must be the "moving force" behind the injury in order to be liable, *Board of County Comm'rs of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 400 (1997) (citation omitted), a county is not liable for the conduct of a nominal county official who, in fact, acts as a state official. *See McMillian v. Monroe County, Alabama*, 520 U.S. 781 (1997). Moreover, because a suit for damages against state officials in their official capacities is, in

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[1] By a separately filed non-published order, I resolve the remaining issues raised in the county's summary judgment motion. *See Kouba v. Allstate Ins. Co.*, 523 F. Supp. 148, 151, n. 2. (1981), *rev'd on other grounds*, 691 F.2d 873 (9th Cir. 1982).

effect, a suit against the state, the Eleventh Amendment bars such an action. *See id.*[2]

The determination of whether a county official acts for the state or for the county is a question of law, *see Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989), which, as a first consideration, turns on how the state defines the official's functions. *See McMillian*, 520 U.S. at 786.[3] Because initially state law defines the relationship of sheriffs to the state, a determination of that relationship may vary from one jurisdiction to another.[4] Thus, to resolve the present motion I must turn to California law to determine the status of a county sheriff. As will

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[2] Of course, suits under § 1983 lie against government officials, state or local, sued in their individual capacity for injuries caused by their conduct in violation of the plaintiff's established constitutional rights. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985) ("Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law.")

[3] In *McMillian*, the High Court held that "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties." *Id.* at 793. To reach this conclusion, the Court considered various Alabama statutes, *see id.* at 789-90, and the state "constitutional provisions concerning sheriffs, the historical development of those provisions, and the interpretation given them by the Alabama Supreme Court. . . . " *Id.* at 787.

[4] The High Court explained that "it is entirely natural that both the role of sheriffs and the importance of counties vary from State to State, [and thus] there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another." *Id.* at 795.

become apparent, California has not addressed this question with a single voice or a single answer.[5]

Subsequent to *McMillian*, the California Supreme Court, analyzing the California Constitution and various California statutes, concluded that a district attorney represents the State when prosecuting crimes and when training employees concerning the prosecution of crimes. *See Pitts v. County of Kern*, 17 Cal.4th 340, 353 (1998). A California Court of Appeal, analyzing the same state law provisions addressed in *Pitts*, and noting that the words "sheriff" and "district attorney" appear in tandem in many of the cited authorities, concluded that California county sheriffs act as state officials when they establish policies concerning the release of persons from county jails. *See County of Los Angeles v. Superior (Peters)*, 68 Cal.App.4th 1166, 1174 (1998).[6]

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[5] As I have previously explained, in resolving questions of California law, this court "is bound by the pronouncements of the California Supreme Court," *Ortland v. County of Tehama*, 939 F. Supp. 1465, 1468 (E.D. Cal. 1996) (citing *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 273 (1940)), and the opinions of the California Courts of Appeal are merely "data for determining how the highest California court would rule." *Ortland*, 939 F. Supp. at 1468 (quoting *Scandinavian Airlines Systems v. United Aircraft Corp.*, 601 F.2d 425, 427 (9th Cir. 1979) (internal quotation marks omitted)). While in the absence of other evidence, the opinions of California courts of appeal on questions of California law cannot simply "be ignored[,]" *Ortland*, 939 F. Supp. at 1468, a conflicting decision of the Ninth Circuit obligates adherence by this court to the Circuit's decision and rejection of the non-binding California precedent. *See, e.g., United States v. Milto*, 714 F.2d 294, 298 (3d Cir. 1983).

[6] The persuasive force of *Peters* as to this court is significantly undermined by virtue of Ninth Circuit precedent

The *Peters* Court cited article V, section 13 of the California Constitution[7] and Cal. Gov't Code § 12560[8] which generally provide that sheriffs are under the supervision of the State Attorney General. The *Peters* Court

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holding that a sheriff is "the county official that state law indicates is the official policymaker regarding arrestee detention in [the] County jail." *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1444 (9th Cir. 1989) (citing Cal. Gov't Code § 26605). *See* n. 5, *supra*.

[7] That article provides:

> Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdiction as to the Attorney General may seem advisable.

[8] The statute provides:

> The Attorney General has direct supervision over the sheriffs of the several counties of the state, and may require of them written reports concerning the investigation, detection and punishment of crime in their respective jurisdictions. Whenever he deems it necessary in the public interest he shall direct the activities of any sheriff relative to the investigation or detection of crime within the jurisdiction of the sheriff, and he may direct the service of subpoenas, warrants of arrest, or other processes of court in connection therewith.

also cited Cal. Gov't Code § 26600 which "imposes on county sheriffs the duty to enforce criminal law" and Cal. Gov't Code § 25303 which provides that county boards of supervisors may not, pursuant to their general powers of supervision over county officers, "affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff. . . . " *Id.* at 1175.

While *Pitts* and *Peters* are suggestive of the resolution of the issue at bar, they are not directly determinative as *Pitts* deals with district attorneys and *Peters* addresses the function of California sheriffs relative to administering county jails.[9] Moreover, as I now demonstrate, other California cases demonstrate that there is significant ambiguity as to the status of sheriffs under California law.

In *Dibbs v. County of San Diego,* 8 Cal.4th 1200 (1994), the California Supreme Court upheld the right of San Diego County to establish a citizen police review board to consider public complaints about the county sheriff's department. In doing so, the court cited to Cal. Gov't Code § 25303[10] and rejected the argument that § 25303

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[9] The question of whether particular officials act for the state or a county is not a categorical "all or nothing" question, but is rather a question of whether or not the official is a "final policymaker[ ] for the local government in a particular area, or on a particular issue." *McMillian,* 520 U.S. at 785 (citation omitted).

[10] Cal. Gov't Code § 25303 provides:

> The board of supervisors shall supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county, and particularly insofar as the functions and duties of

limited the county's authority to monitor county officers solely to their fiscal conduct. *See id.* at 1209. Rather, the court observed that, under that statute, a county board of supervisors has the power "to supervise the county officials in order to assure that they faithfully perform their duties." *Id.* at 1209 (citing *People v. Langdon*, 54 Cal.App.3d 384, 390 (1976) (internal quotation mark omitted). The court further explained that "the operations of the sheriff's department . . . and the conduct of employees of th[at] department[ ] are a legitimate concern of the board of supervisors." *Dibbs*, 8 Cal.4th at 1209. The court did not perceive that these general supervisorial powers were in conflict with the obligation of the board not to obstruct the sheriff's office's investigative

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such county officers and officers of all districts and subdivisions of the county relate to the assessing, collecting, safekeeping, management or disbursement of public funds. It shall see that they faithfully perform their duties, direct prosecutions for delinquency and, when necessary, require them to renew their official bond, make reports and present their books and accounts for inspection.

This section shall not be construed to the effect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney of a county. The Board of Supervisors shall not obstruct the investigative function of the sheriff of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney of a county.

Nothing contained herein shall be construed to limit the budgetary authority of the board of supervisors over the district attorney or sheriff.

function. *See id.* at 1210-14.[11] Moreover, as long ago as 1942, a California court of appeals concluded that supervision by the Attorney General does not alter the status of sheriffs as elected county officials. *See People v. Brophy*, 49 Cal.App.2d 15, 27 (1942). The *Brophy* Court explained:

> Manifestly "direct supervision [by the Attorney General under article V, section 21 of the California Constitution[12]] over every . . . sheriff . . . " does not contemplate absolute control and direction of such officials. Especially is this true as to sheriffs . . . as the provision plainly indicates. These officials are public officers, as distinguished from mere employees, with public duties delegated and entrusted to them, as agents, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which they, as agents, are active.[13]

Id.

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[11] The *Pitts* Court, however, cited to *Dibbs* as evidence of the limited power that a county board of supervisors has over the statutory duties of its nominal officers. *See* 17 Cal.4th at 358.

[12] Article V, section 21 of the California Constitution was repealed on November 8, 1966 and replaced with article V, section 13 which is identical for the purposes of the matter at bar.

[13] Indeed, at least one way of viewing the complex status of California sheriffs is to recognize that in California counties are political subdivisions of the state, *see Moor v. County of Alameda*, 411 U.S. 693 (1973), thus explaining the state Attorney General's power of supervision. The status of political subdivision has, however, never been held to preclude suit against California counties. *See Moor, supra; and see Headwaters Forest Defense v. County of Humboldt*, 211 F.3d 1121 (1999) (County amenable to suit under § 1983 for excessive force claim).

In sum, while *Pitts* addresses the status of California district attorneys and *Peters* addresses sheriffs only in their function as jail administrators, *Dibbs,* represents a direct holding concerning the relationship of county boards of supervisors to sheriffs, but also in a different context, and *Brophy* addresses the relationship of the Attorney General to sheriffs. Under the circumstances, this court must conclude that whether California county sheriffs, when investigating crimes, are county or state officials under California law is unsettled.

As noted above, California's statutory law is also not dispositive. Although under Cal. Gov't Code § 24000 "the officers of the county [include a] sheriff," as noted above the power of boards of supervisors over sheriffs in their investigative function is, by statute, significantly limited.[14]

The uncertain status of California sheriffs under the state's law led this court to seek information concerning another criterion established by the *McMillian* case. The Supreme Court observed that another way of ascertaining the status of a nominal county official is an inquiry into the actual function of the official. *See McMillian,* 520 U.S. at 786.[15] In that light, this court referred the matter back

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[14] The limitation on the boards of supervisors does not *ipso facto* transform county sheriffs into state officers. As *Brophy* notes, sheriffs are county officers and thus the limitations may constitute no more than division of responsibility among county officials.

[15] The Court noted that any effort to merely insulate otherwise local officials from suit was precluded by allowing the plaintiff to prove a widespread practice had been

to the parties for further briefing on the actual practice. Unfortunately, neither party has provided the court with evidence concerning the Attorney General's supervision of the sheriff of Shasta County in his investigative function. There is no evidence about how frequently, if ever, the Attorney General actually supervises the sheriff's conduct of his office, reviews policies adopted by the sheriff, or otherwise limits the discretion of the sheriff as to how his officers shall conduct investigations.[16]

Given the lack of determinative guidance, the question now is how is this court to resolve the issue? If this were a factual issue the mode of resolution would be quite direct: the party bearing the burden of proof, must lose. Here, however, the question is one of law, and thus cannot turn on the burden of persuasion. It appears to this court that the doctrine of *stare decisis* aids the court's resolution of the issue, though it does not command an answer.

The doctrine of *stare decisis*, i.e., the requirement to "adhere to decided cases," *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 953 (1992) (Rehnquist J. concurring in part and dissenting in part) (quoting *Black's Law Dictionary* 1406 (6th ed. 1990)) (internal quotation

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established by custom or usage. *See id.* at 796 (quoting *City of St. Louis v. Praprontnik*, 485 U.S. 112, 127 (1988) (plurality opinion)) (quotation marks omitted).

[16] Although the County, in its further briefing, noted that the State requires training of deputies pursuant to standards established and implemented by the state's Department of Justice, Cal.Penal Code § 832.3, that again fails to address the specific issue at bar.

marks omitted), "compels lower courts to follow the decisions of higher courts on a question of law." 18 Coquillette et. al, *Moore's Federal Practice* § 134.01[1] (3d ed. 2000). As observed in footnote 5, *supra*, as a general matter, this court must adhere to a holding of the Ninth Circuit until it is overruled. This obligation is not dependent on the correctness of the Circuit's decision. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982) (obligated to follow decision "no matter how misguided.") Moreover, it is the holding which binds, not the rationale. *See In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996). Given this constraint on the court, I conclude that the holding in *Thompson*, 885 F.2d 1439, that sheriffs, at least when acting as jail administrators, act as county officials, indicates, and may be under the circumstances, the only basis for resolution of the issue at bar by this court.[17] Because the holding of *Thompson* is that the sheriff is a county official under state law, I will conclude that the sheriff in the matter at bar is a county official.

Candor requires me to acknowledge that *Pitts* and *Peters* suggest that *Thompson* may no longer be viable. On the other hand, *Dibbs* and *Brophy* support *Thompson*. Under the circumstances, discretion is the better part of valor, *see Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 741 (7th Cir. 1986), and this court will follow

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[17] The *Peters* court dismissed *Thompson* as "decided before *McMillian* [and thus] hav[ing] limited precedential value." 68 Cal.App.4th at 1177. This treatment of *Thompson* is not available to this court because, unlike the California courts of appeal, this court is bound by Ninth Circuit decisions.

Thompson's holding unless overruled by a court which binds this court.

Having reached the conclusion noted above, the court also recognizes that this is clearly a case justifying interlocutory consideration by the Ninth Circuit and accordingly, the court will certify it for interlocutory appeal. Because the issue is central to so much § 1983 litigation, this court will order this opinion published in an effort to overcome the circuit's well-known diffidence relative to interlocutory appeal.[18]

IT IS SO ORDERED.

DATED: September 19, 2000.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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[18] Granting an interlocutory appeal should not represent an undue burden on the Ninth Circuit as the determinative matter here turns initially on an issue of California law susceptible to certification to the California Supreme Court. *See* California Rules of Court 29.5.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS BREWSTER, Plaintiff-Appellee v. SHASTA COUNTY, a public entity; BRAD MCDANNOLD, an individual; D. COMPOMIZZO, an individual, Defendants-Appellants. --- CALIFORNIA STATE ASSOCIATION OF COUNTIES; YAGMAN & YAGMAN & REICHMANN, Amici Curiae.	No. 01-15118 DC #CV-98-02157-LLK ORDER (Filed Feb. 6, 2002)

Before: HALL, WARDLAW, and BERZON, Circuit Judges.

The panel has voted to deny appellants' petition for rehearing. Judges Wardlaw and Berzon have voted to deny appellants' petition for rehearing en banc and Judge Hall recommends denial. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 01-15118
CT/AG#: CV-98-02157-LKK

THOMAS BREWSTER

Plaintiff-Appellee

v.

SHASTA COUNTY, a public entity;
BRAD MCDANNOLD, an individual;
D. COMPOMIZZO, an individual

Defendants-Appellants

CALIFORNIA STATE ASSOCIATION
OF COUNTIES; YAGMAN &
YAGMAN & REICHMANN

Amici Curiae
(Filed Feb. 19, 2002)

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of

the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered December 28, 2001

Supreme Court, U.S.
FILED
JUN 5 2002
OFFICE OF THE CLERK

No. 01-1640

In The Supreme Court of the United States

SHASTA COUNTY, BRADD McDANNOLD and DAVID COMPOMIZZO,

Petitioners,

vs.

THOMAS BREWSTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Brewster v. Shasta County, 275 F.3d 803 (9th Cir. 2001), holds that California sheriffs act on behalf of their respective counties when setting policies for investigating crimes. The opinion is a thoughtful, well-founded and routine application of the analysis set forth in *McMillian v. Monroe County*, 520 U.S. 781 (1997), for determining which government officials are final policymakers for entity defendants sued under 42 U.S.C. § 1983.

Respondent Thomas Brewster was exonerated by DNA results obtained during his trial on capital murder and rape charges. He then filed this suit, claiming that two Shasta County sheriff's department detectives manipulated evidence to create a false impression that he was the perpetrator. Petitioners' motion for summary judgment was denied. *Brewster v. Shasta County*, 112 F.Supp.2d 1185 (E.D. Cal. 2000). The Ninth Circuit affirmed, rejecting petitioners' claim that policymaking decisions regarding law enforcement by California sheriffs should be attributed to the state rather than counties, thus allowing Mr. Brewster to pursue a claim against Shasta County pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978).[1] That claim remains pending in the trial court, with no trial date set.

The certiorari petition does not focus on a *McMillian* analysis of whether California sheriffs act on behalf of the

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[1] Both the district court and the Court of Appeals in unpublished opinions denied qualified immunity for petitioners Bradd McDannold and David Compomizzo, the two sheriff's department investigators. (The former is misidentified in the petition caption as "Brad McDonald.") These qualified immunity rulings are not challenged in the certiorari petition.

state or their counties when setting policy relating to the investigation of crimes – the issue addressed by the parties in the district court and the Ninth Circuit. Instead petitioners fire a broadside at section 1983 litigation in general, contending that "law enforcement officers" "employed by a local governmental entity" are entitled to "Eleventh Amendment immunity" when "engaged in the investigation of a violation of State law." Pet. Cert. at 1.

This novel and extreme argument was not raised below – for good reason. The Eleventh Amendment has never been held to bar section 1983 actions against law enforcement officers in their individual capacities, including those employed by state agencies; it bars only official capacity suits against state officials. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985) (explaining distinction). This certiorari petition reads as if its authors do not understand the difference between claims made against public officials in their individual capacities as opposed to those made against them in their official capacities. Were the law as petitioners suggest, liability under section 1983 – which requires state action as an element of liability – could not be established.

Moreover, petitioners confuse the absolute immunity afforded judges and prosecutors with the qualified immunity available to law enforcement officers. *See* Pet. Cert. at 7-10. If this Court were to hold that law enforcement officers are entitled to the same absolute immunity as judges and prosecutors – as opposed to qualified immunity – it would overrule *Monroe v. Pape*, 365 U.S. 473 (1961), thus ending police misconduct litigation in the federal courts.

Brewster does not represent a departure from established law. It follows *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir.), *cert. denied*, 122 S.Ct. 59 (2001) (California sheriffs act for county when managing jails), was itself followed by *Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (9th Cir. 2002) (California sheriffs and district attorneys act for county when investigating crimes),[2] and is consistent with *Weiner v. San Diego County*, 210 F.3d 1025 (9th Cir. 2000) (California district attorneys act for state when prosecuting crimes). These four cases demonstrate that the Ninth Circuit, like other lower courts, has no difficulty applying *McMillian*. Moreover, no significant conflicts have developed among other federal or state courts.

In short, the standards of rule 10 have not been met and this petition for a writ of certiorari should be denied.

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[2] The opinion in *Bishop Paiute Tribe* was rendered less than a week after the Ninth Circuit's opinion in *Brewster*. *Bishop Paiute Tribe* did not mention the Ninth Circuit *Brewster* opinion but did approve the published district court opinion in *Brewster* and reached the same conclusion as the Ninth Circuit did in *Brewster*.

The petition states that *Bishop Paiute Tribe* "is currently pending before the Ninth Circuit *en banc*." Pet. Cert. at 10 n. 1. That statement was never true. A petition for rehearing with a suggestion for review en banc was pending before the original panel when the petition was filed. Later it was denied because "no judge of the court . . . requested a vote on whether to rehear the matter en banc." Order Amending Opinion and Denying the Petition for Rehearing and the Suggestion for Rehearing En Banc (filed May 20, 2002).

ARGUMENT

I. *BREWSTER* APPLIED *McMILLIAN* PROPERLY WHEN IT DETERMINED THAT IN CALIFORNIA SHERIFFS ACT ON BEHALF OF COUNTIES WHEN INVESTIGATING CRIMES.

In *McMillian*, the Court, analyzing Alabama constitutional, statutory and decisional law, concluded that for section 1983 purposes Alabama sheriffs are policymakers for the state, and not their respective counties, when setting policy for law enforcement functions. In doing so, the Court identified several unique and historically specific aspects of Alabama law that influenced its decision and directed the lower courts to conduct both state-by-state and function-by-function analyses when applying *McMillian* in other situations.[3]

In their "Reasons for Granting Certiorari" petitioners claim that in *McMillian* "this Court concluded that a County Sheriff enjoys Eleventh Amendment immunity

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[3] Unlike California and many other states, Alabama expressly makes its sheriffs members of the State Executive Committee, along with the Governor and other state-wide officials. *McMillian* noted that the turn-of-the-century amendments to the Alabama Constitution which incorporated sheriffs into the executive branch of the state government demonstrated "the framers' intent to ensure that sheriffs be considered executive officers of the state," 520 U.S. at 789 (citing *Parker v. Amerson*, 519 So.2d 442, 444 (Ala. 1987)), to "solidify the place of the sheriffs in the executive department, and to clarify that sheriffs were acting for the State when exercising their law enforcement functions." *Id.* at 788. There are reasons peculiar to the deep south for Alabama's including sheriffs in state government. "Historically, Alabama county sheriffs were squarely placed under state control to stop them from assisting lynch mobs in killing black prisoners." *Streit*, 236 F.3d at 561 n. 11.

when acting on behalf of the State." Pet. Cert. at 6. Not only is the Eleventh Amendment not mentioned in *McMillian* – or in *Brewster* for that matter – the Court expressly rejected "a uniform, national characterization for all sheriffs," noting that "States have wide authority to set up their state and local governments as they wish," and that "the importance of counties and the nature of county government have varied historically from region to region, and from State to State." 520 U.S. at 795. Since "both the role of sheriffs and the importance of counties vary," "there is no inconsistency created by court decisions that declare sheriffs to be county officers in one State, and not in another." *Id.*

Moreover, *McMillian* requires a function-by-function analysis to determine whether a policymaker is acting on behalf of the state or a county. "A court's task is to 'identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.'" *Id.* at 784-85 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)).

Significantly, when the petitioner in *McMillian* pointed out that "most Federal Courts of Appeals have found county sheriffs to be county, not state, officials," the Court responded that there was no danger its conclusion regarding Alabama "will either call these decisions into question or create an unacceptable patchwork of rulings as to section 1983 liability of counties for the acts of their sheriffs. We reject both arguments: The first ignores the history of sheriffs, and the second ignores our Nation's federal nature." *Id.* at 793.

Brewster begins its analysis of whether California sheriffs act on behalf of their counties when investigating crime by noting that although *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir.), *cert. denied*, 122 S.Ct. 59 (2001), a case involving jail management, "does not resolve the question presented in the instant case, the analysis of California law governing sheriffs already undertaken in *Streit* provides the starting point for our own analysis." *Brewster*, 275 F.3d at 806.

> The question in *Streit* was whether a California sheriff, in administering the county's policy for release from county jails, acted for the county or the state. We began our analysis with an examination of the California Constitution, which identifies California sheriffs as county officials. Unlike the Alabama Constitution that the Supreme Court considered in *McMillian*, "the California Constitution does not list sheriffs as part of 'the state executive department.'" *Streit*, 236 F.3d at 561 (quoting *McMillian*, 520 U.S. at 787, 117 S.Ct. 1734) (internal quotation marks omitted). "Instead, Article XI, section 1(b) of the California Constitution designates sheriffs as county officers." *Id.* . . .
>
> . . . .The Supreme Court explained in *McMillian* that it was "critical" for the case and "strong evidence in favor of the . . . conclusion that sheriffs act on behalf of the State" that a judgment against an Alabama sheriff would be a suit against the State, and that the county would not be liable for a sheriff's acts under respondeat superior. 520 U.S. at 789, 117 S.Ct. 1734; *see also Streit*, 236 F.3d at 562. Here, however, California law places liability on the county. Cal. Gov. Code § 815.2; *Streit*, 236 F.3d at 562.

. . . . The California Code also provides that California sheriffs are elected county officers. *Id.* at 562 (citing Cal. Gov. Code § 24000(b); Cal. Elec. Code § 314). Sheriffs are required to maintain their offices at the county seat with other county officers. *Id.* (citing Cal. Gov. Code § 24250). Sheriff vacancies are filled in the same manner as other elective county officers. *Id.* (citing Cal. Gov. Code § 24205). The services of the sheriff may be contracted out by the county – not the state. *Id.* (citing Cal. Gov.Code § 53069.8). We found that "[t]hese various state provisions lead inexorably to the conclusion that the [sheriff] is tied to the County in its political, administrative, and fiscal capacities." *Id.*

Finally, we examined California case law and concluded that the relevant cases further supported our holding that the county was liable for the sheriff's actions. *Id.* at 562-63 (discussing *Sullivan v. County of Los Angeles*, 527 P.2d 865, 868-69 (Cal. 1974) (holding that the county was liable for the sheriff's failure to release a prisoner who had completed a sentence), and *Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 251 Cal.Rptr. 444 (1988) (holding that control over the local prisons is within the authority of the individual counties)). We rejected the county's reliance on *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998), in which the California Court of Appeal held that the Los Angeles Sheriff's Department was a state actor and therefore immune from section 1983 liability. We noted that the cases presented distinct factual scenarios. *Streit*, 236 F.3d at 564. Moreover, we explained that we were not bound by the conclusion of the California Court of Appeal in *Peters*, because the question

> regarding section 1983 liability ultimately implicated federal, not state, law. *Id.* Our examination of "the precise function at issue in conjunction with the state constitution, codes, and case law" led us to "conclude that the [sheriff] acts as the final policymaker for the county when administering the County's release policy." *Id.* at 564-65, 80 Cal.Rptr.2d 860.

Id. at 806-07. Although addressing a jail policy, *Streit* noted that in California the sheriff's department "is generally a county, not state, agency." *Streit*, 236 F.3d at 561. Thus, "[i]t require[d] little extension of *Streit*" for the *Brewster* court "to conclude that the Shasta County Sheriff acts for the County, not the state, when investigating crime in the county." *Brewster*, 275 F.3d at 80; *accord Bishop Paiute Tribe v. County of Inyo*, 275 F.3d 893 (9th Cir. 2002).[4]

Streit, *Brewster* and *Bishop Paiute Tribe* follow the line of Ninth Circuit cases holding California counties liable under section 1983 for constitutional deprivations by sheriffs. *See, e.g., Henry v. Shasta County*, 132 F.3d 512,

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[4] The holdings of *Streit*, *Brewster* and *Bishop Paiute Tribe* are consistent with the "home rule" operating principle of California government. *See Dibb v. County of San Diego*, 8 Cal.4th 1200, 1206-19, 884 P.2d 1003, 1006-15, 36 Cal.Rptr.2d 55, 58-67 (1994) (state constitution grants "home rule" to counties by means of charters).

McMillian cited a study "explaining how regional influences have resulted in different forms of county government in different States" and listing Alabama in the lowest third of all states in the amount of discretionary authority granted to its counties. 520 U.S. at 795. California is in the upper third, the group of states granting the most discretionary authority to counties. De Santis & Renner, *Governing the County*, in *County Governments in an Era of Change* 19, Table 2.1 (P. Berman ed. 1993).

518 (9th Cir. 1997), *amended*, 137 F.3d 1372, *cert. denied sub nom. Pope v. Henry*, 525 U.S. 819 (1998) (practice of submitting recalcitrant motorists to unpleasant jail conditions); *Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995) (discriminatory treatment of 911 calls); *Redman v. County of San Diego*, 942 F.2d 1435, 1455 (9th Cir.), *cert. denied*, 502 U.S. 1074 (1991) (practice not to segregate "aggressive" homosexuals from vulnerable detainees); *Bouman v. Block*, 940 F2d 1211, 1231 (9th Cir. 1991) (discrimination in promotion of female deputies); *Thompson v. City of Los Angeles*, 885 F.2d 1439 (9th Cir. 1989) ("custom" of unconstitutional jail conditions); and *Cabrales v. County of Los Angeles*, 864 F.2d 1454, 1460-61 (9th Cir. 1988), *cert. granted and remanded on other grounds*, 490 U.S. 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir.), *cert. denied*, 494 U.S. 1091 (1990) (deliberate indifference to psychological needs of suicidal county jail prisoners).

Streit, *Brewster* and *Bishop Paiute Tribe* are also consistent with decades of California state court decisions imposing liability on counties for the actions of sheriffs and their deputies. *See*, e.g., *Sullivan v. Los Angeles County*, 12 Cal.3d 710, 717, 117 Cal.Rptr. 241, 245 (1974) (failure to release prisoner from jail); *Nelson v. Superior Court (County of Los Angeles)*, 89 Cal.App.4th 565, 107 Cal.Rptr.2d 469 (2001) (death of improperly restrained arrestee); *Choate v. County of Orange*, 86 Cal.App.4th 312, 103 Cal.Rptr.2d 339 (2000) (partygoers brawl with deputies); *Newton v. County of Napa*, 217 Cal.App.3d 1551, 266 Cal.Rptr. 682 (1990) (alleged battery and false imprisonment of children during abuse investigation); *Bastian v. County of San Luis Obispo*, 199 Cal.App.3d 520, 245 Cal.Rptr. 78 (1988) (negligence); *Allison v. County of Ventura*, 68 Cal.App.3d 689, 137 Cal.Rptr. 542 (1977)

(defective arrest warrant); *Marshall v. Los Angeles County*, 131 Cal.App.2d 812, 281 P.2d 544 (1955) (personal injury of county prisoner).

In sum, like *Streit* and *Bishop Paiute Tribe*, *Brewster* was correctly decided in light of *McMillian* and apposite state and federal precedent addressing California sheriffs. Accordingly, there is no reason for the Court to review the case now.

II. *BREWSTER* IS CONSISTENT WITH OTHER COURTS APPLYING THE *McMILLIAN* ANALYSIS.

A. Cases Arising In California

There are five published decisions in addition to *Streit* and *Brewster* applying *McMillian* to California sheriffs and two applying it to district attorneys. *Bishop Paiute Tribe* applies it to both. The holdings do not conflict, and do not suggest that the Court should grant certiorari to clarify the law.

The district court opinion in *Brewster* is one of two published trial court orders that a county has section 1983 liability for its sheriff's policies and practices in law enforcement. The other, *Roe v. County of Lake*, 107 F.Supp.2d 1146 (N.D. Cal. 2000) (policies relating to female crime victims), contains an excellent summary of the role of the California sheriff:

> Recognizing that local police power is derived from the State, *McMillian* requires a court to analyze the delegation of that power to determine whether it was sufficiently complete such that a suit for abuse of that power is not a suit against the State. It seems clear from the analysis

> above that California's delegation of authority to [the county sheriff] is sufficiently complete. It is difficult to see how a judgment against a sheriff who, as is alleged here, permits his office to violate the civil rights of women in the way he maintains his staff and sets his policies, will operate as a judgment against the State. . . . The deterrent effect of paying any judgment plaintiff may obtain will be felt in Lake County. If the public is dissatisfied with the way [the sheriff] treats women victims, he will either not be reelected by the voters of Lake County or he will be impeached before a Lake County grand jury. It is hard to see how any of this will violate California's sovereignty.

107 F.Supp.2d at 1151-52.

There are two published district court opinions holding that the sheriff acts for the county in the function of jail administrator. *Von Colln v. County of Ventura*, 189 F.R.D. 583 (C.D. Cal. 1999) (strapping inmates into inhumane "chair"); *Leon v. County of San Diego*, 115 F.Supp.2d 1197 (S.D. Cal. 2000) (indifference to inmates' medical needs). On the other hand, in *Hawkins v. Comparet-Cassani*, 33 F.Supp.2d 1244 (C.D. Cal. 1999), *rev'd in part on other grounds*, 251 F.3d 1230 (9th Cir. 2001) (deputy sheriff acting as court bailiff activated electric belt on order of judge to shock pro per criminal defendant), the district court held that a sheriff, when setting policy for the deputy sheriffs who staff the state's superior courts, acts as a policymaker for the state rather than the county.

The California Supreme Court, in *Pitts v. County of Kern*, 17 Cal.4th 340, 345, 949 P.2d 920, 923, 70 Cal.Rptr. 823, 826 (1998), applied *McMillian* and decided that "a California district attorney acts on behalf of the state . . .

when preparing to prosecute and while prosecuting criminal violations of state law, and when establishing policy and training employees in these areas." The Ninth Circuit independently reached the same conclusion in *Weiner v. County of San Diego*, 210 F.3d 1025 (9th Cir. 2000).[5] In both cases, the courts stressed the quasi-judicial role played by prosecutors as well as California's long history of treating district attorneys in their prosecutorial role as state officials. *See, e.g., Weiner*, 210 F.3d at 1030 ("In 1894, the California Supreme Court held that the district attorney . . . '[i]n the prosecution of criminal cases . . . acts by

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[5] Petitioners cite *Weiner* with approval, *see, e.g.*, Pet. Cert. at 13, although it rejects the contention made at pages 11 and 12 of the petition that under *McMillian* federal courts must parrot state-court conclusions regarding whether a public official acts on behalf of the state for purposes of § 1983 liability:

> In *Pitts v. County of Kern*, 17 Cal.4th 340, 70 Cal.Rptr.2d 823, 949 P.2d 920 (1998), the California Supreme Court, following *McMillian*, analyzed California law and held that a district attorney was a state official for purposes of § 1983 liability while acting in his prosecutorial capacity. *See id.* at 928-34. The California Supreme Court is the ultimate interpreter of California state law. *See Johnson v. Fankell*, 520 U.S. 911, 916, 117 S.Ct. 1800, 138 L.Ed.2d 108 (1997). This does not mean, however, that we must blindly accept its balancing of the different provisions of state law in determining liability under § 1983.
>
> In *McMillian*, the Court stated that "our inquiry is dependent on an analysis of state law," which does not mean "that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a governmental official, in a particular area, will necessarily be dependent on the definition of the official's function under relevant state law." *McMillian*, 520 U.S. at 785, 117 S.Ct. 1734 (emphasis added). We must, therefore, examine California's constitution, statutes, and case law.

210 F.3d at 1028-29.

the authority and in the name of the people of the state.' *Modoc County v. Spencer*, 103 Cal. 498, 37 P. 483, 484 (1894).").

Weiner is limited to the function of criminal prosecutions. "Although a California district attorney is a state officer when deciding whether to prosecute an individual, this is not to say that district attorneys in California are state officers for all purposes. To the contrary, California law suggests that a district attorney is a county officer for some purposes." *Weiner*, 210 F.3d at 1031. Similarly, *Pitts* makes clear that the "conclusion as to which entity the district attorney represents might differ were plaintiffs challenging a district attorney's alleged action or inaction related to ... [an] administrative function arguably unrelated to the prosecution of state criminal law violations." 17 Cal.4th at 363. Thus, petitioners are not correct in stating that "[D]istrict attorneys are immune from 1983 claims." Pet. Cert. at 13.

The care in which the Ninth Circuit has followed *McMillian*'s admonition to make determinations function-by-function is illustrated by its recent opinion in *Bishop Paiute Tribe*. Officials from the district attorney's office and sheriff's department investigating alleged welfare overpayments together executed a search warrant on offices of an Indian tribe. Noting that the administration of welfare in California is, by statute, a county function,[6] and that no prosecutions had as yet been instituted, the Ninth Circuit concluded that both the sheriff and district

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[6] Cal. Welf. & Inst. Code § 10800 provides that the administration of public social services is "declared to be a county function and responsibility and therefore rests upon the boards of supervisors in the respective counties."

attorney acted on behalf of the county. *Id.* at 273. ("There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, . . . and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested.") (citing *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)).[7]

The Ninth Circuit's careful consideration of the structure of California government and its function-by-function approach in *Weiner, Streit*, *Brewster* and *Bishop Paiute Tribe* contrasts favorably with the perfunctory decision of a California intermediate appellate court in *County of Los Angeles v. Los Angeles Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998), on which petitioners place much weight. *See* Cert. Pet. at 23-25. *Peters* failed to address California's constitutional structure, salient state statutes, and key decisions from the California Supreme Court. It did not focus on the function involved – the jail's "determining whether to release a person who may be subject to arrest on an outstanding warrant," *Peters*, 68 Cal.App.4th at 1177 – when concluding that the sheriff was acting on behalf of the state. In any event, because the sheriff was carrying out a state court order, rather than exercising the plenary

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[7] The distinction between prosecutorial and law enforcement functions is mirrored in California's government tort claims act, which provides absolute immunity for malicious prosecution while preserving governmental liability for false arrest and imprisonment. *See Asgari v. City of Los Angeles*, 15 Cal.4th 744, 937 P.2d 273, 63 Cal.Rptr.2d 842 (1997). This differentiation derives from the common law (*cf. Imbler v. Pachtman*, 424 U.S. 409, 421-24 (1976) (common law provided absolute immunity for prosecutors)) which "has never granted police officers an absolute and unqualified immunity." *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

duties of the sheriff's department, the *holding* of *Peters* harmonizes with the other California-based decisions, even though some of its language might not.[8]

B. Cases Arising In Other Jurisdictions.

In the brief time since *McMillian* was decided, the lower federal and state courts have applied its analysis to a wide variety of cases involving sheriffs. If there is a pattern emerging, it is that when sheriffs are engaged in law enforcement, jail management, or personnel administration, courts are more likely to find that they are local policymakers, recognizing that Alabama's change in law to incorporate its sheriffs into the state government does not generally parallel laws in other states. On the other hand, when sheriffs faithfully execute court processes – such as writs or warrants – courts generally find that sheriffs act on behalf of the state, much like prosecutors do. In other words, the lower courts have adhered to the Court's direction that the question of state-versus-local authority be resolved on a state-by-state and function-by-function basis, and appear to have encountered little difficultly doing so.

1. Law Enforcement.

Since *McMillian*, on the few occasions that circuit courts considered sheriffs in states other than Alabama and California they have determined that in exercising law enforcement functions the sheriff is a local or county

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[8] The flaws in *Peters* suggest the sort of "blatant effort to shield . . . local governments from liability" Chief Justice Rehnquist cautioned against in *McMillian*. *See* 520 U.S. at 796.

policymaker. *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999) (Illinois), and *Grech v. Clayton County*, 288 F.3d 1287 (11th Cir. 2002) (Georgia).

Generally lower courts outside the deep south have agreed that sheriffs exercising their law enforcement functions act on behalf of their counties. For example, in *Abraham v. Piechowski*, 13 F.Supp.2d 870 (E.D. Wis. 1998), the trial court, after noting that "*McMillian* recognized that the importance of counties and the nature of county government may vary from state to state, which can impact a court's characterization of the sheriff," found that under the Wisconsin law (a statutory and constitutional framework which, like that of California, originally derived from the laws of New York) the sheriff was a local policymaker. *Id.* at 879. Similar determinations were reached in Tennessee, *Spurlock v. Sumner County*, 42 S.W.3d 75 (Tenn. 2001), and Pennsylvania. *Open Inns, Ltd. v. Chester County Sheriff's Department*, 24 F.Supp.2d 410, 413 (E.D. Pa. 1998) (sheriff's policy of allowing deputies to assist private parties in seizing personal property without "any inquiry into the legality of such actions" ("don't ask, don't think") to be that of a local policymaker).

2. Jail Management and Administration

Noting that *McMillian* recognized that a sheriff's policymaking capacity would vary from state to state, courts not addressing Alabama law have uniformly found that sheriffs are local officials regarding jail policies. *See Ramsey v. Schauble*, 141 F.Supp.2d 584 (W.D.N.C. 2001); *Boncher v. Brown County*, 272 F.3d 484 (7th Cir. 2001) (Wisconsin); *DeGenova v. Sheriff of DuPage County*, 209

F.3d 973 (7th Cir. 2000) (Illinois). In contrast, *Turquitt v. Jefferson County*, 137 F.3d 1285 (11th Cir.), *cert. denied*, 525 U.S. 874 (1998), applied the *McMillian* analysis to Alabama and recognized that after *McMillian* concluded that Alabama sheriffs were state policymakers for law enforcement purposes, a new examination had to be performed for the jail-management function. *Turquitt* concluded that the reasons underlying the unusual role of sheriffs in Alabama state government made sheriffs state policymakers in their jail management function as well as in their law enforcement function.

3. Employment and Personnel Policies

Not surprisingly, several courts have found that in matters of employment and personnel policies, sheriffs who have the power to hire, fire and discipline department employees act in a local policymaking capacity. See, e.g., *Jeffes v. Barnes*, 208 F.3d 49 (2d Cir.), *cert. denied sub nom. County of Schenectady v. Jeffes*, 531 U.S. 813 (2000); *Brady v. Fort Bend County*, 145 F.3d 691 (5th Cir. 1998), *cert. denied,* 525 U.S. 1105 (1999); *Aleman v. Milwaukee County*, 35 F.Supp.2d 710 (E.D. Wis. 1999).

4. Staffing Courts and Executing Process

In *Alencastro v. Sheahan*, 297 Ill.App.3d 478, 698 N.E.2d 1095 (1998), the court was confronted with a suit arising from the service of an eviction writ. The court found that "the defendant was a state actor in executing the court order for possession," relying on Illinois law requiring that "sheriffs shall serve and execute all warrants, process, orders, and judgments of every description

that may legally be directed or delivered to them." *Id.* at 483, 698 N.E.2d at 1099.

On the other hand, in *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001), a case in which deputy sheriffs serving as courtroom bailiffs killed a man appearing in traffic court while restraining him, the Court of Appeals denied a motion to dismiss brought by the sheriff, who claimed he was acting in the capacity of a state officer. "The sheriff has no discretion in whether to obey a judge's orders, but we are aware of no state policy directing the sheriff's actions regarding the training and supervision of deputies in the use of force in carrying out state court orders." *Id.* at 440.

These and other cases[9] decided in the five years since *McMillian* underscore *McMillian*'s clarity and the uniformity with which its analysis has been applied – even though, as should be the case in light of *McMillian's* analytical framework, the outcome varies from state-to-state and from function-to-function.

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[9] *McMillian* has also been applied to decide whether particular officials other than sheriffs are state or local policy makers. *E.g., Burge v. Parish of St. Timony*, 187 F.3d 452 (11th Cir. 1999) (holding district attorneys to be local); *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir.) (same), *cert. denied sub nom. Roe v. Carter*, 528 U.S. 1005 (1999); *Myers v. County of Orange*, 157 F.3d 66 (2d Cir. 1998) (district attorney's blanket policy of not accepting cross-complaints in criminal cases was local, despite the fact that district attorneys would be immune from liability for *initiating* prosecutions), *cert. denied*, 525 U.S. 1146 (1999); *Pharris v. Looper*, 6 F.Supp.2d 720 (M.D. Tenn. 1998) (holding county assessors to be local).

CONCLUSION

For the foregoing reasons, respondent asks that the Court deny the petition for certiorari.

Dated: Pasadena, California, June 5, 2002

Respectfully submitted,

JOHN BURTON, *Counsel of Record*
MARY ANNA SOIFER

Supreme Court, U.S.
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(3)

No. 01-1640

In The
Supreme Court of the United States

SHASTA COUNTY, a public entity; BRAD McDANNOLD, an individual; and D. COMPOMIZZO, an individual,

Petitioners,

v.

THOMAS BREWSTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* SUPPORTING THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *Monell v. Dept. of Soc. Serv. of City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978) require that, in order for a California county to be subject to direct liability for a sheriff's policy or conduct, the county, through its governing body, must be able under state law to control or correct the policy or conduct at issue? If so, did the Ninth Circuit err in holding that, despite a sheriff's constitutionally and statutorily designated independence from a county's governing body, the board of supervisors, in the area of criminal investigations, the Shasta County Sheriff acts for Shasta County when investigating crime?

2. Did the Ninth Circuit err in its reliance upon a *respondeat superior* statute in holding that, in the area of criminal investigations, official capacity suits against the sheriff under 42 U.S.C. § 1983 are suits against the county?

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STATEMENT OF *AMICUS CURIAE* INTEREST

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state.[1]

In *Brewster v. County of Shasta*, 275 F.3d 803 (9th Cir. 2001), the Ninth Circuit Court of Appeals published a decision which holds that California sheriffs act on behalf of California counties in the area of criminal investigations. The Litigation Overview Committee of CSAC, which monitors litigation of concern to counties statewide, has determined that this case will have a dramatic and adverse affect on all California counties. California counties are routinely sued under *Monell v. Dept. of Soc. Serv. of City of New York,* 436 U.S. 658, 98 S.Ct. 2018 (1978), for claims involving sheriffs' alleged deficient policies or practices in the area of criminal investigations. *Brewster* subjects counties to *Monell* liability for sheriffs' official policies or practices in the area of criminal investigations despite the fact that counties are constitutionally and statutorily powerless to make, execute, control or correct those policies or practices. Further, *Brewster*'s reasoning from a *respondeat superior* statute to county liability under 42 U.S.C. § 1983 portends a dramatic expansion of county liability beyond that which is intended or allowed by *Monell*.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

All parties have consented in writing to the filing of this brief by *Amicus Curiae*, California State Association of Counties.

REASONS FOR GRANTING CERTIORARI

Amicus Curiae CSAC asks this Court to make explicit that which is implied in the analysis undertaken in *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 117 S.Ct. 1734 (1997): A conclusion that a government official's particular function or conduct is exercised for a local government entity for the purpose of imposing direct liability pursuant to 42 U.S.C. § 1983, requires a finding that the local government entity's governing body is authorized by state law to make, control or alter policy governing the particular function or conduct at issue.

The Ninth Circuit's departure in *Brewster* from the implicit requirement of *Monell* and *McMillian* that public entities incur liability only for policies or practices that they, through their governing bodies, can control, has drastic, far-reaching consequences for the litigation of all claims of *Monell* liability in the Ninth Circuit. First, *Brewster* effectively subjects California counties to direct liability for a sheriff's constitutionally deficient policies or conduct despite the inability of the county to correct the deficient policy or conduct. *Brewster* is likely to create a risk management crisis for California counties (and other public entities if *Brewster's* holding is extended) because counties are powerless to avoid liability. Second, by ignoring state law's treatment of who controls the precise function at issue, and by its heavy and misplaced reliance upon a *respondeat superior* statute, the Ninth Circuit has

effectively enacted vicarious liability of counties for all deficient sheriffs' policies.

The linchpin of the Ninth Circuit's decision in *Brewster* is the theory that the sheriff's constitutionally and statutorily designated functional independence from the county in the area of criminal investigations does not mean he does not act for the county when investigating crime. *Brewster*, *supra*, 275 F.3d at 809-10. By contrast, in *McMillian* this Court identified the functional independence of the Alabama sheriff, the county's lack of "powers and duties" in the area of criminal law enforcement and the existence of control by the governor and attorney general as the most important factors in the determination that Alabama sheriffs do not act for Alabama counties. 520 U.S. at 790-91. *Brewster* subjects a California county to direct liability for a sheriff's constitutionally deficient policy or conduct in the area of criminal investigations despite the inability of the county to direct the sheriff to correct the deficient policy or conduct. *Brewster* thereby violates the teaching of *Monell* that public entity liability under 42 U.S.C. § 1983 may not be based on *respondeat superior* principles, but rather must be based on a showing that the public entity's policy choices were the "moving force" of the constitutional violation.

If *Brewster* is not overturned, California counties face repeated claims and judgments for the same deficient law enforcement policies or conduct in the area of criminal investigations because counties are legally powerless to correct the deficient policies or conduct. Further, by basing its decision on a *respondeat superior* statute rather than an analysis of whether state law gives counties powers or duties over the function at issue, the Ninth Circuit has effectively enacted county *Monell* liability regardless of the

function at issue. Unless *Brewster* is overturned, California counties face an expansion of direct liability under 42 U.S.C. § 1983 far beyond that which is warranted under *Monell*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *McMillian*, this Court considered whether Alabama sheriffs act for Alabama counties when acting in their law enforcement capacity, so as to subject counties to municipal liability under 42 U.S.C. § 1983 for the constitutional torts of the sheriff. The Court concluded that the weight of state constitutional and statutory provisions governing the sheriff's relationship with the state compelled the conclusion "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties." 520 U.S. at 793.

In accordance with its prior holdings that the identification of final policymaking authority for purposes of *Monell* liability "is a question of state law," the Supreme Court held state law must control the determination of which entity the sheriff represents when performing his or her law enforcement duties. *Id.* at 786. The Supreme Court identified the sheriff's functional independence from the county, the defendant county's inability under state law to control the sheriff in the exercise of his law enforcement functions, and the existence of control by the state's governor and attorney general, as the most important factors in holding that the customs or policies of the sheriff were not attributable to the county. *Id.* at 790-91. While the issue of control was paramount in the *McMillian* analysis, this Court has not yet described a defendant

public entity's ability to exercise control over particular conduct by an official as an essential element of a finding that the public entity is subject to *Monell* liability for the official's conduct.

In *Brewster,* the Ninth Circuit holds that, despite the fact that California law establishes a California sheriff "functions independently" from the county in the area of criminal investigations, California sheriffs act for the counties when investigating crime. *Brewster*, 275 F.3d at 809-10. The effect of the *Brewster* decision is to impose direct *Monell* liability on California counties for deficient policies in the area of criminal investigations despite the complete powerlessness of counties, through their governing bodies, to correct or remedy the deficient policies. The Ninth Circuit was able to reach this result only by disregarding the implicit instruction of *Monell* and *McMillian* that public entities should be liable under 42 U.S.C. § 1983 only when they have the power to remedy the unlawful conduct.

The Ninth Circuit's heavy reliance on California's *respondeat superior* statute for its holding is misplaced because it depends on a misapplication of the analysis in *McMillian*. In *McMillian,* this Court observed that because suits against Alabama sheriffs in a law enforcement capacity were deemed suits against the state, Alabama counties did not have *respondeat superior* liability for a sheriff's law enforcement conduct. 520 U.S. at p. 789. The Ninth Circuit has turned the *McMillian* analysis on its head, holding that a county's obligation to indemnify its employees under California Government Code § 815.2 requires a finding that official capacity suits against the sheriff are suits against the counties. The Ninth Circuit's reliance upon California Government Code § 815.2, to the

exclusion of the implicit requirement of *McMillian* for a finding that a public entity is able under state law to exercise control over the function at issue, portends an expansion of *Monell* liability along the lines of *respondeat superior* liability.

LEGAL ARGUMENT

I. THE NINTH CIRCUIT ERRED IN HOLDING THAT, DESPITE THE CONSTITUTIONALLY AND STATUTORILY DESIGNATED INDEPENDENCE OF SHERIFFS FROM COUNTIES IN THE AREA OF CRIMINAL INVESTIGATIONS, THE SHASTA COUNTY SHERIFF ACTS FOR SHASTA COUNTY WHEN INVESTIGATING CRIME.

A. *Brewster* conflicts with an implicit requirement of *Monell* and *McMillian* that, in order for a public entity to be subject to liability pursuant to 42 U.S.C. § 1983 for a sheriff's policy or conduct, the county's governing body must have the ability to correct the deficient policy or conduct.

In *Monell,* this Court held that municipal liability pursuant to § 1983 could not be based on any form of vicarious liability. 436 U.S. at 691. This holding was based upon legislative history indicating that, in enacting § 1983, Congress sought to impose municipal liability only when the municipality was empowered to prevent unconstitutional conduct. *Id.* at 693. Thus, only when "a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is liable under § 1983." *Id.* at 691.

This requirement seems to preclude a finding of public entity liability when the public entity's governing body lacks authority to correct the constitutionally deficient policy or custom.

In *McMillian,* the Court found "most importantly," that Alabama sheriffs were given complete authority by statute to enforce the criminal law in their jurisdictions, that Alabama counties have no powers or duties in law enforcement and that the governor and attorney general do have this control. 520 U.S. at 790-91. Thus, the "governing body" of Alabama counties, the county commission, "cannot instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of crime." The Court continued, "[w]hile the county commission thus has no direct control over how the sheriff fulfills his law enforcement duty, the governor and attorney general do have this kind of control." *Id.* at 790-91. When analyzing other provisions of Alabama law, for example the county's budgetary authority and the payment of the sheriff's salary, the Court focused on whether the provisions translated into direct county control over the sheriff's law enforcement function. *Id.* at 791-92. The Court's analysis therefore implies that the county's ability to exercise control over the law enforcement function is essential to a finding that the sheriff acts for the county in a law enforcement capacity.

Despite *McMillian's* emphasis on the issue of a county's control over a particular function or conduct, the Ninth Circuit's decision in *Brewster* contains no reference whatsoever to the discussion of this issue in *McMillian.* Consistent with its disregard of the analytical framework of *McMillian*, the Ninth Circuit completely failed to analyze whether state law empowers California counties to control sheriffs when investigating crime. Significantly,

the failure to undertake this analysis and to make a finding as to who controls the function at issue is a violation of the Ninth Circuit's own pre-*McMillian* precedent. In *Eggar v. City of Livingston,* 40 F.3d 312 (9th Cir. 1994), wherein the plaintiff sued over a city judge's furtherance of the city's alleged policy of refusing to provide counsel to indigents, the Ninth Circuit held that *"[a] municipality cannot be liable for [official] conduct it lacks the power to require, control, or remedy, even if that conduct parallels or appears entangled with the desires of the municipality."* (Emphasis added.) *Id.* at 316.

In *Brewster,* the Ninth Circuit repudiated as irrelevant California law establishing that California counties cannot control sheriffs in their investigatory function. The court expressly rejected the application of California Government Code § 25303, which states that counties cannot control sheriffs in their "independent and constitutionally and statutorily designated investigative and prosecutorial functions." *Brewster*, 275 F.3d at 809-10. The Ninth Circuit reasoned that § 25303 has no bearing on the issue of whether the sheriff acts for the county because it merely expresses the separation of powers doctrine. *Id.* at 810. This reasoning is fallacious because it begs the question of why counties should be liable for a sheriff's investigatory conduct if the counties are powerless to correct or remedy the conduct.

In rejecting the application of § 25303, the Ninth Circuit held that the sheriff's functional independence from the county "does not mean he does not act *for* the county." (Emphasis in original.) *Id.* at 810. The Ninth Circuit thereby completely unhinged its analysis from the analysis required to be undertaken by *McMillian*. Further, the result reached in *Brewster* would not have been

possible but for the Ninth Circuit's conclusion that a sheriff's constitutionally and statutorily designated independence in the area of criminal investigations is not relevant to a finding that the sheriff acts for the county when investigating crime.

B. The Ninth Circuit ignored or misconstrued critical provisions of California law which establish that, while California counties have no control over how a sheriff investigates crime, the California Attorney General does have this control.

The *Brewster* decision contains no discussion of California law establishing that California counties are powerless to direct the sheriff while conducting criminal investigations. The *Brewster* decision contains only a passing reference to, and no analysis of, *Pitts v. County of Kern*, 17 Cal.4th 340, 358-59, 70 Cal.Rptr.2d 823 (1998), in which the California Supreme Court held that, while the governing bodies of California counties lack powers or duties in the investigation, detection and prosecution of crime, the Attorney General does have this control. Yet, the analysis undertaken in *Pitts* obviously merits a prominent role in the analytic framework of *McMillian*. The Ninth Circuit made no reference to the California Attorney General's statutory duty under California Government Code § 12560 to "direct the activities of any sheriff relative to the investigation or detection of crime within the jurisdiction of the sheriff. . . ." This provision of law obviously merits a prominent role in analyzing whether a sheriff acts for the county when investigating crime.

The Ninth Circuit gave little or no weight to California's constitutional provision that places sheriffs under the

"direct supervision" of the State Attorney General, because the provision gives the Attorney General authority over "other law enforcement officers." *Brewster*, 275 F.3d at 808-9. However, the Ninth Circuit failed to observe that, unlike counties, the Attorney General exercises his supervisory duties subject to the constitutional authority of California cities to constitute, regulate and govern a city police force. *See,* Cal. Const., art. XI, § 5(b)(1).

In *Brewster*, the Ninth Circuit also failed to observe the State Legislature's exclusive authority to define the sheriff's duties. California counties have no inherent powers and may exercise, through the board of supervisors, only those powers expressly granted by the state Constitution or statute. *Hicks v. Board of Supervisors*, 69 Cal.App.3d 228, 242, 138 Cal.Rptr. 101 (1977). The State Legislature is exclusively empowered to provide for a county sheriff. Cal. Const., art. XI, § 1. The power of the State Legislature to provide for a county sheriff includes the exclusive power to define the sheriff's duties: "The Legislature has always had, and still enjoys plenary power to define the sheriff's duties. . . . Because the sheriff, as stated, is a constitutional officer, his duties are of statewide importance, a fact further cemented by the existence of myriad statutes regulating his duties." *Beck v. County of Santa Clara*, 204 Cal.App.3d 789, 796, 800, 251 Cal.Rptr. 444 (1988).

The Ninth Circuit relied upon selected portions of the holding in *Dibb v. County of San Diego,* 8 Cal.4th 1200, 1210, 36 Cal.Rptr.2d 55 (1994), that California Government Code § 25303 authorized the creation of a citizens' review board to consider public complaints about the probation and sheriff's departments. *Brewster*, 273 F.3d at 808. However, the Ninth Circuit failed to mention the most

relevant portion of *Dibb*, wherein the California Supreme Court held that the review board must "not interfere . . . with the Attorney General's constitutional responsibility to oversee the sheriff. [citations]." In fact, the Supreme Court noted that the County Board of Supervisors was powerless to "'*direct the manner in which the [sheriff's] duties are performed.*'" *Dibb, supra*, 8 Cal.4th at 1209, n. 4 (emphasis added).

While noting the sheriff's status as an elected official under the state Constitution, the Ninth Circuit completely misconstrued what that means. In *Brewster,* the Ninth Circuit implied that, unlike Alabama sheriffs, the elected status of California sheriffs places California sheriffs outside "the state executive department." *Brewster*, 273 F.3d at 809. To the contrary, the constitutional change requiring the sheriff to be elected was intended to place the sheriff outside the control of local government. *Connolly v. County of Orange*, 1 Cal.4th 1105, 1113, fn. 9, 4 Cal.Rptr.2d 857 (1992) (In the case of any elected official under California Const., art. XI, § 1, a county may not "control, indirectly or directly, the manner in which the duties are performed."). The Ninth Circuit's interpretation makes a mockery of California's constitutional and statutory law providing that the Attorney General has exclusive supervisory authority over the sheriff's law enforcement function.

The Ninth Circuit falsely distinguishes between Alabama's provision for impeachment by the State Supreme Court and California's provision for impeachment by a county grand jury. *Brewster*, 273 F.3d at 808. The Ninth Circuit failed to mention that in California county grand juries are an arm of state government. The grand jury is an arm of the Superior Court and is under the control of the Superior Court. *People v. Superior Court*

(1973 Grand Jury), 13 Cal.3d 430, 438-39, 119 Cal.Rptr. 193 (1975). The Superior Court is, in turn, an arm of the state. *Sacramento and San Joaquin Drainage Dist. v. Superior Court*, 196 Cal. 414, 432 (1925) (superior courts of the State of California "are not local or county courts, but constitute a system of state courts. . . . "); *County of Sonoma v. Workers Comp. Appeals Bd.*, 222 Cal.App.3d 1133, 1141, 272 Cal.Rptr. 297 (1990) (under the state Constitution, the functioning of the courts is a state matter, not a local matter). Thus, the Ninth Circuit sidestepped the obvious fact that, while California's statutory provisions for removal of a sheriff are not identical to Alabama's, they are, like Alabama's, constitutionally and statutorily state-based and not a matter of county concern or control.

The complete lack of county control over the sheriff's investigatory function is abundantly clear from California's constitutional, statutory and case law. Neither the description of the sheriff's title as a county officer, nor the fact that he is elected by county voters, nor the fact he is paid by the county, alters the longstanding treatment of the sheriff, at least when engaged in his investigatory function, as an officer of the state. In *McMillian,* this Court found significant the common law history of the sheriff as an officer or agent of the King, and the continuation of that common law tradition in the United States. *McMillian, supra,* 520 U.S. at 794. In characterizing the plaintiff's argument that the interrelationship between the sheriff and the county required a finding the sheriff be deemed to act on behalf of the county as "simply a disagreement with the ancient understanding of what is meant to be a sheriff," the Court evinced its understanding that under common law, a sheriff is a state officer while

carrying out his duty to keep the peace. *Id.* at 795. Significantly, the common law of England, insofar as it is not repugnant to or inconsistent with the laws of the state, is the rule of decision in all California courts. *See,* California Civil Code § 22.2.

II. THE NINTH CIRCUIT ERRED IN RELYING UPON A VICARIOUS LIABILITY STATUTE TO DETERMINE WHETHER SHERIFFS ACT FOR COUNTIES WHEN PERFORMING THEIR INVESTIGATORY FUNCTION.

In holding that sheriffs act for the counties when investigating crime, the Ninth Circuit places heavy reliance on Government Code § 815.2's requirement that public entities indemnify their employees. *Brewster,* 273 F.3d at 807, 808. This reliance is misplaced because it is based on a distortion of *McMillian*'s analysis and because it has no place in an analysis of whether an official acts for a public entity so as to subject the public entity to direct liability under 42 U.S.C. § 1983.

A. The Ninth Circuit's reliance on Government Code § 815.2 is based on a misapplication of *McMillian*.

In *McMillian,* this Court found it critical that the Alabama Supreme Court held that, because "sheriffs are state officers . . . tort claims brought against sheriffs based on their official acts therefore constitute suits against the States, not suits against the sheriff's county." 520 U.S. at 789. Thus, it is clear the Alabama courts reasoned *from* the sheriff's capacity as a state law enforcement official *to* the county's lack of *respondeat superior* liability for the

sheriff's official law enforcement conduct. In *Brewster*, the Ninth Circuit reverses the reasoning of the Alabama courts and this Court in *McMillian*. The Ninth Circuit reasons from the existence of Government Code § 815.2, which requires all public entities, including the state, to indemnify their employees, that counties are therefore liable for official capacity suits against the sheriff. The logic of the *McMillian* analysis is thereby turned completely on its head.

The Ninth Circuit's misapplication of *McMillian* and resulting reliance on Government Code § 815.2 may be due to a failure to distinguish official capacity suits against the sheriff, who is not a county employee, from individual capacity suits against sheriff deputies for their constitutional torts. Pursuant to the decisions in *Pitts v. County of Kern*, *supra*, 17 Cal.4th 340, and *County of Los Angeles v. Superior Court (Peters)*, 68 Cal.App.4th 1166, 80 Cal.Rptr.2d 860 (1998), it is now settled that, under California law, counties cannot have *respondeat superior* liability for official capacity suits based on an exercise of the sheriff's law enforcement function.

B. Principles of *respondeat superior* have no place in an analysis of whether an official acts for a public entity so as to subject the public entity to direct liability under 42 U.S.C. § 1983.

Whether a county is subject to *Monell* liability in a particular area should not be based on whether the county or the state's treasury is impacted. Analysis of *Monell* liability based on who pays a judgment is backwards because it cannot be determined whose treasury is properly impacted

until it is determined which entity is subject to liability under 42 U.S.C. § 1983.

A county's protection from direct liability under 42 U.S.C. § 1983 derives solely from recognition that *Monell* liability will not lie for certain conduct undertaken by a public official on behalf of the state. *See, Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304 (1989). Whether a policymaker acts on behalf of the county or the state is a question to be determined by the function involved, and, most importantly, which entity is authorized under state law to control the policymaker's performance of that function. *See, City of St. Louis v. Praprotnik,* 485 U.S. 112, 123-24, 108 S.Ct. 915 (1988) (reaffirming that "the identification of policymaking officials *is not a question of federal law*") (emphasis added). If an analysis of whose treasury is impacted is used to determine which entity a policymaker represents, the analysis is certain to beg the question of whether the challenged action was "taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the [public entity's] business." *Id.* at 123.

The Ninth Circuit's reasoning from a vicarious liability statute to the direct liability of counties under *Monell* for the official acts of the sheriff is circular and does not answer the question of which entity, the county or the state, exercises control over the sheriff's investigatory function. Further, reliance on *respondeat superior* principles will inevitably lead to the result that counties are always liable for the acts of the sheriff, regardless of the function involved or whether the counties control that function.

CONCLUSION

For all the foregoing reasons, *Amicus Curiae* respectfully urges the Court to grant the Petition for Writ of Certiorari and to hold that 1) a conclusion that a government official exercises a particular function for a local government entity for the purpose of imposing direct liability pursuant to 42 U.S.C. § 1983, requires a finding that the local government entity's governing body is authorized by state law to make, control or alter policy governing the particular function at issue and 2) the Ninth Circuit erred in holding that, despite the sheriff's functional independence from the county's governing body, the board of supervisors, in the area of criminal investigations, the Shasta County Sheriff acts for Shasta County when investigating crime.

Respectfully submitted,

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(4)

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In The

Supreme Court of the United States

SHASTA COUNTY, a public entity; BRAD McDANNOLD, an individual; and D. COMPOMIZZO, an individual,

Petitioners,

v.

THOMAS BREWSTER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF CALIFORNIA STATE SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

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I. INTEREST OF AMICUS CURIAE.[1]

Amicus Curiae is the California State Sheriffs' Association ("CSSA"), which is an association representing every elected sheriff of all of the 58 counties of the State of California. The CSSA is familiar with the questions of law and fact involved in this case, and how the resolution of the questions presented to the Ninth Circuit Court of Appeals below directly affects the very nature and character of the office of Sheriff in the State of California.

II. SUMMARY OF THE ARGUMENT.

Amicus Curiae, the membership of whom have countless combined years of experience in law enforcement, respectfully submits to the Court that the Ninth Circuit's opinion in this matter is directly contrary to the law as stated by this Court in *McMillian v. Monroe County*, 520 U.S. 781, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997), and contrary to California law. *McMillian* requires the Ninth Circuit to use California law to determine whether a county officer is acting on behalf of the county or the state in particular actions, for purposes of determining liability pursuant to 42 U.S.C. § 1983. The Ninth Circuit did not consider or did not properly consider California law.

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[1] No counsel for any party authored this brief in whole or in part. No other person, entity or its members, or their counsel, other than CSSA made any monetary contribution to the preparation or submission of this brief. CSSA has received written consent from Rolland Papendick and oral consent from David Prentice, attorney for Respondent, and Scott Davenport, attorney for Petitioner, for the filing of this brief.

The Supreme Court has characterized the office of Sheriff as part of the State Executive Department. The California Constitution requires the State Legislature to provide for an elected county sheriff. The Constitution also provides that the Attorney General directly supervises sheriffs. Moreover, the County Board of Supervisors has limited fiscal authority over the office of Sheriff and may not interfere with the investigative and prosecutorial functions of the office of Sheriff. The duties of the office of Sheriff are prescribed by State statute and the Sheriff enforces state policy as set forth in state law, particularly the California Penal Code. Therefore, the CSSA respectfully urges this Court to grant the Petition for Writ of Certiorari in this matter, as there is compelling reason to do so. California Supreme Court Rule 10(c).

III. THE NINTH CIRCUIT COURT OF APPEALS HAS ISSUED AN OPINION THAT IS IN CONFLICT WITH THIS COURT'S DECISION IN *MCMILLIAN*, AND CERTIORARI, THEREFORE SHOULD BE GRANTED.

Amicus Curiae respectfully requests that the California Supreme Court grant the Petition for Writ of Certiorari in this matter to review the Ninth Circuit Court of Appeals decision in *Shasta County v. Brewster*, 275 F.3d 803 (9th Cir. 2001). There are compelling reasons for granting the requested Writ. The Ninth Circuit Court of Appeals has decided an aspect of important California law relating to an important federal question in a way that conflicts with relevant decisions of this Court, namely *McMillian v. Monroe County*, 520 U.S. 781, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997), and California law. Supreme Court Rule 10(c).

The Ninth Circuit Court of Appeals determined that the Shasta County Sheriff's Department can be held liable for a violation of civil rights, pursuant to 42 U.S.C. § 1983, because the Sheriff is a *county* officer and not a *state* officer, according to the Court's interpretation of California law. The Ninth Circuit Court of Appeals ignored or improperly discounted critical California law, contrary to *McMillian*, in so concluding, however.

In *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), this Court held that local governments, including counties, are liable under Section 1983 for their official policies. *McMillian*, at 784, 117 S. Ct. at 1736, 138 L. Ed. 2d at 7 (citing *Monell*, at 694, 56 L. Ed. 2d at 638, 98 S. Ct. at 2037). If the county officials are acting on behalf of the state rather than the county, however, then no liability attaches, as the state is immune from liability under Section 1983. The critical analysis, therefore, in this matter is whether the Shasta County Sheriff's Department is acting as a state or county agency in investigating and enforcing state criminal laws.

The California Supreme Court, although in dicta, specifically determined, over 130 years ago, that "the Sheriffs, Recorders, etc., in the several county organizations, are also members of the [State] Executive Department." *Harpending v. Haight*, 39 Cal. 189, 213 (1870). Similarly in *McMillian*, this Court focused on the fact that the Alabama Constitution specifically provided that Sheriffs were part of the state executive department. *McMillian*, at 787, 117 S. Ct. at 1738, 138 L. Ed. 2d at 9 (quoting Ala. Const. of 1901, Art. V, § 112). The Ninth Circuit did not consider this aspect of California law, articulated by the State's highest court. In fact, the Ninth

Circuit focused only on the fact that such statement is *not* contained in the California *Constitution*, pointing out that the Constitution instead "identifies the sheriff as a county officer." *Brewster*, 275 F.3d at 807. The Constitution actually requires that the State Legislature "*provide for*" an elected county sheriff. Cal. Const. art. XI, § 1 (emphasis added). It is actually the California *Code* which provides that the sheriff is a county officer. Cal. Govt. Code § 24000. Neither of these provisions, however, preclude the characterization of California Sheriffs as acting on behalf of the State in certain aspects of their duties. This is true especially in light of the fact that, based on identical Constitutional language in the same provision, the California Supreme Court has held that District Attorneys are acting on behalf of the State in their prosecutorial function. Cal. Const. art. XI, § 1 (the Legislature is required to provide for an elected District Attorney); *Pitts v. County of Kern*, 17 Cal. 4th 340, 70 Cal. Rptr. 2d 823, 949 P.2d 920 (1998) (holding District Attorney acting on behalf of State when prosecuting).

It is clear from the legislative history of the Constitutional provision, quoted above and relating to Sheriffs, that the People of the State of California intended to provide for an elected Sheriff, independent of the county in certain respects. The voters were informed in the ballot materials, provided for consideration in passing this particular provision of the Constitution, that "sheriffs require a degree of independence free from undue political influence" and that the proposed Constitutional provision would make "the sheriff directly accountable to the people." Ballot Materials for Constitutional Amendment to Article XI, §§ 1(b) & 4(c), Argument in favor of Proposition 6, *available in* University of California, Hastings

California Ballot Propositions Database <http://www.uchastings.edu/library/ballotprops.htm>.

The voters were further informed, in relation to a later amendment to the same provision, that "an election of the county sheriff and district attorney makes sense for two reasons: (1) the law grants considerable discretion to these local law enforcement officials, and (2) they may be called upon to investigate or prosecute members of the county board of supervisors." Ballot Materials for Constitutional Amendment to Article XI, §§ 1(b) & 4(c), Argument in favor of Proposition 66, *available in* University of California, Hastings California Ballot Propositions Database <http://www.uchastings.edu/library/ballotprops.htm>. The Ninth Circuit nullified this critical intent, supporting the Constitutional provision at issue here, by stating that "[t]he provision thus is akin to a separation of powers provision," and concluded that "[m]erely because a county official exercises certain functions independently of other political entities within the county does not mean that he does not act for the county." *Brewster*, 275 F.3d at 810. The opposite is equally true, however. Simply because the Sheriff is a county official, situated in a particular geographical region and paid by the County, does not mean that he or she cannot act for the State in investigating and enforcing State law. *Pitts*, at 355-56, 949 P.2d 920, 930, 70 Cal. Rptr. 2d 823 (noting that "district attorneys and state judges are often considered state officials, even though they too have limited jurisdictions and are elected locally") (internal quotations omitted) (quoting *McMillian*, at 791, 117 S. Ct. at 1740, 138 L. Ed. 2d at 11-12); *McMillian*, at 791, 117 S. Ct. at 1740, 138 L. Ed. 2d at 11-12 (noting that the county paid the sheriff, but finding only indirect control by the county of the sheriff). The Sheriff, after all,

is enforcing *State* policy, as that policy is determined in the California Penal Code in particular, when he or she investigates State crimes and effectuates arrests pursuant to violations of State law. As noted by the California Court of Appeal and equally applicable to Sheriffs, "it is difficult to imagine how a district attorney's enforcement of *state law* could be characterized as creating local policy." *Pitts*, 17 Cal. 4th at 360, 70 Cal. Rptr. 2d at 933, 949 P.2d 920 (1998) (emphasis added) (citing *Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993) ("'Clearly, state criminal laws . . . represent the policy of the state.'")).

This Court further noted that as part of the Alabama executive department, such Sheriffs "have to take the constitutional oath of office, and are required to submit written reports to the governor on demand." *Id.* at 787 n.5, 117 S. Ct. at 1738 n.5, 138 L. Ed. 2d at 9 n.5 (citing Ala. Const. of 1901, Art. XVII, § 279 & Ala. Const. of 1875, Art. XV, § 1). Similarly, California law provides that the Attorney General can require written reports from Sheriffs relating to the investigation, detection and punishment of crime. Cal. Govt. Code § 12560. The Ninth Circuit Court of Appeals noted this provision, but did not give weight to this factor in favor of California Sheriffs acting on behalf of the State, contrary to this Court's opinion in *McMillian. Brewster*, 275 F.3d at 809. California law also provides that Sheriffs must take a constitutional oath of office. Cal. Const. art. XX, § 3 ("all public officers . . . shall, before they enter upon the duties of their respective offices, take and subscribe the following oath," with public officer explicitly including, among others, every officer of the State and every county). The Ninth Circuit failed to consider this factor.

In the Ninth Circuit's opinion in this matter, it focuses on the fact that county Sheriffs in Alabama were subject to impeachment, while California Sheriffs are subject to county grand jury indictment, although the Ninth Circuit did recognize that "this factor may be of somewhat limited weight because a state court appoints the prosecutor to conduct impeachment proceedings." *Brewster*, 275 F.3d at 808. This Court's discussion of the fact that Alabama Sheriffs were subject to impeachment, however, is not an absolute indication of whether Sheriffs are acting on behalf of the state or the county.

Instead, this Court used that factor to point out the framers' intent to put authority for the removal of Sheriffs with the Governor in an effort to end mob lynchings in which the Sheriffs were passively participating. While the Ninth Circuit rightly recognized that such historical background is not present in California, the absence of such history does not render California's determination that its Sheriffs act on behalf of the State, in at least some capacities, meaningless.

In particular, the California Court of Appeal, in considering the office of the Sheriff, analyzed ballot materials relating to the adoption of the Constitutional provisions regarding the Sheriff, and noted that the materials emphasized that "sheriffs have broad powers and responsibilities enumerated in virtually *all* of the California *[state] codes*, one of the most awesome of these responsibilities being a mandate to take appropriate action when there is a breakdown of law enforcement at the *local* level in a municipality." *Beck v. County of Santa Clara*, 204 Cal. App. 3d 789, 799, 251 Cal. Rptr. 444, 449 (1988). This responsibility is reflective of a Sheriff acting on behalf of the *State*, especially in light of the fact that

"[t]he State is divided into counties which are legal subdivisions of the State." Cal. Const. art. XI, § 1(a). *See also, Younger v. Board of Supervisors of San Diego County*, 93 Cal. App. 3d 864, 870, 155 Cal. Rptr. 921, 924-25 (1979) ("Since counties constitute merely political subdivisions of the state, they have independently only such legislative authority that has been expressly conferred by the *Constitution* and *laws* of the *state*. If the latter sources are silent in regard to the delegation of such authority, the authority must still rest with the Legislature.") (citing Cal. Const., art. XI, § 1(a); *Hicks v. Board of Supervisors*, 69 Cal. App. 3d 228, 242, 138 Cal. Rptr. 101 (1977); *Byers v. Board of Supervisors*, 262 Cal. App. 2d 148, 155, 68 Cal. Rptr. 549 (1968); *Simpson v. Payne*, 79 Cal. App. 780, 785-786, 251 P. 324 (1926)). The California Court of Appeal has also emphasized that the Constitution "does not specify any of [the Sheriff's] duties; instead they are specified in great detail in a large body of *[state] statutory* law." *Beck*, at 796, 251 Cal. Rptr. at 447 (1988) (emphasis added) (citing Cal. Penal Code § 4000 et seq.; Cal. Govt. Code § 26600 et seq.; and Cal. Govt. Code § 23013).

Moreover, the Ninth Circuit's reliance on this factor has little significance when considered in light of the fact that District Attorneys are similarly subject to grand jury indictment rather than impeachment, but have definitively been determined by the California Supreme Court to be acting on behalf of the State. Cal. Govt. Code §§ 3060 ("An accusation in writing against any officer of a district, county, or city, . . . , for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed.") & 24000 (District Attorney is county officer); *Pitts v. County of Kern*, 17 Cal. 4th 340, 70 Cal. Rptr. 2d 823, 949 P.2d 920

(1998) (District Attorney acts on behalf of State in prosecuting crimes).

One other critical aspect of California law relating to the office of Sheriff was considered and dismissed by the Ninth Circuit. The California Government Code requires the board of supervisors to "supervise the official conduct of all county officers" with a focus in particular on the extent to which their official "functions and duties... relate to the assessing, collecting, safekeeping, management, or disbursement of public *funds*." Cal. Govt. Code § 25303 (emphasis added). This section also specifically provides, however, as follows:

> This section shall not be construed to affect the *independent* and *constitutionally* and *statutorily* designated *investigative* and prosecutorial functions of the *sheriff* and district attorney of a county. The board of supervisors shall not obstruct the *investigative* function of the *sheriff* of the county nor shall it obstruct the investigative and prosecutorial function of the district attorney of a county.

Id. See also, Cal. Const. art. V, § 13 (powers of Attorney General, including supervision of Sheriffs). The California Court of Appeal specifically determined that "because the sheriff, as stated, is a *constitutional* officer, his duties are of *statewide* importance, a fact further cemented by the existence of myriad *[state] statutes* regulating his duties." *Beck v. County of Santa Clara*, 204 Cal. App. 3d 789, 800, 251 Cal. Rptr. 444 (1988) (emphasis added) The California Constitution also specifically provides that the State Attorney General is "the chief law officer of the State" and has the duty "to see that the laws of the State are uniformly and adequately enforced." Cal. Const. art. V,

§ 13. The Attorney General also specifically has "*direct supervision* over every district attorney *and* sheriff . . . , in *all* matters pertaining to the *duties* of their respective offices." *Id.* (emphasis added).

Once again, the Ninth Circuit refused to give weight to these provisions of State law governing the characterization of the office of Sheriff in the State of California. The Ninth Circuit acknowledged that the provisions relating to the supervision of Sheriffs and District Attorneys by the Attorney General are similar, but points out that the Attorney General is authorized to actually prosecute law in any county where such laws are not being adequately enforced, and is further specifically authorized to have all the powers of the District Attorney. *Brewster*, 275 F.3d at 810. The Ninth Circuit erroneously points out that "[n]o similar provision permits the Attorney General to assume the powers of a sheriff." *Id.* In fact, the Attorney General does have the statutory authority to, "[w]henever he deems it necessary in the public interest, . . . appoint some *competent*[2] person to perform the duties of sheriff with respect to the investigation or detection of a particular crime and cause the arrest of persons in connection therewith. Any person so appointed has all the powers of a sheriff with respect to the particular matter." Cal. Govt. Code § 12561 (emphasis added). *See also* Cal. Govt. Code § 12650 ("Whenever he deems it necessary in the public interest [the Attorney General] shall *direct the activities* of

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[2] The fact that the Attorney General him or herself is not authorized to actually assume those duties may be more a function of competence and expertise in executing the duties of the office of sheriff, rather than an indication that the Attorney General does not have actual supervisory authority over such county officer acting on behalf of the State.

any *sheriff* relative to the *investigation* or *detection* of crime within the jurisdiction of the sheriff, and he may direct the service of subpenas, warrants of arrest, or other processes of court in connection therewith.") (emphasis added).

Perhaps most importantly, the California Court of Appeal specifically held that "in establishing policies for the release of persons from a county jail, a sheriff acts as a *state* official, not a policy maker for the county." *County of Los Angeles v. Superior Court of Los Angeles County (Peters)*, 68 Cal. App. 4th 1166, 80 Cal. Rptr. 2d 860 (1998) (emphasis added). The Ninth Circuit too easily discarded this statement of California law. First, the Ninth Circuit simply stated that it was "not bound by the determination of the California Court of Appeal in *Peters* that California sheriffs are state actors," asserting that "[q]uestions regarding section 1983 liability implicate *federal*, not *state*, law." *Brewster*, 275 F.3d at 811 (emphasis added). This is in direct conflict with the statement of this Court in *McMillian* that the analysis of whether the Sheriff acts on behalf of the county or the state "is dependent on an analysis of state law." *McMillian*, at 785, 117 S. Ct. at 1737, 138 L. Ed. 2d at 8.

Of course this Court qualified this statement regarding a dependence on state law when it also stated that "[t]his is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy." *Id.* This statement, however, should not have been interpreted by the Ninth Circuit as a license to so easily disregard statements by the California courts about whether Sheriffs act on behalf of the state or county. The Ninth Circuit Court, after all, is required to regard "[t]he laws of the several

states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, ... as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652. This is true even of appellate court opinions on matters of state law. As this Court has stated, "[w]here an intermediate appellate state court rests its *considered judgment* upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the *highest court of the state* would decide otherwise." *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 183, 85 L. Ed. 139, 144 (1940) (emphasis added).

Without even really evaluating the law carefully considered by the California Court of Appeal in *Peters*, however, including, as applied by the *Peters* Court, the California *Supreme Court's* analysis of the same issue relating to District Attorneys in *Pitts*, the Ninth Circuit Court of Appeals summarily dismissed this clear statement of California law. *Brewster*, 275 F.3d at 811. In fact, the Ninth Circuit specifically stated that it was satisfied that California case law supported its conclusion regarding the role of California Sheriffs, without specifically determining that the California Supreme Court's decision would be the same. The Ninth Circuit flatly refused to follow the one case directly addressing the issue, the California Court of Appeal opinion in *Peters*, which analyzed identical provisions of California law relating to Sheriffs as were relied upon by the California Supreme Court relating to District Attorneys in *Pitts*.

The critical dilemma created by the Ninth Circuit's evaluation is the discrepancy in an interpretation of *State*

law. Litigants bringing actions against counties in the State of California can do so pursuant to 42 U.S.C. § 1983 in either state or federal court. The results in each court will be contrary, depending upon whether the court is a state trial court, bound to follow *Peters* or a federal district court, constrained by the holding in *Brewster*.

The Ninth Circuit Court of Appeals has clearly departed from this Court's statement of law in *McMillian*. This Court determined in *McMillian* that a court must evaluate Section 1983 liability for a county based upon *state law*, regarding whether the actions are on behalf of the county or the state. Analysis of the California Constitution, its historical background, and the California Supreme and Appellate Court opinions show, in relating to the office of Sheriff, an independence from the County, a clear intent to create a *constitutional* officer for the county, which is a subdivision of the *State*, and supervision by the Attorney General. The Ninth Circuit Court of Appeals simply did not consider some of this law and did not adequately consider the remainder, in light of the Supreme Court's analysis of an almost identical issue in *Pitts*. The Sheriffs' duties are set out by the State Legislature. The County Board of Supervisors is given only limited fiscal control over the office of the Sheriff and such power is specifically limited to the extent that it would affect the "independent constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff." Cal. Govt. Code § 25303; Cal. Const. art. V, § 13.

IV. CONCLUSION.

This Court in *McMillian* specifically stated that state law determines whether a county officer is acting on

behalf of the county or the state for purposes of liability pursuant to 42 U.S.C. § 1983. The Ninth Circuit did not consider the California Court of Appeal opinion in *County of Los Angeles v. Superior Ct. of Los Angeles County (Peters)*, 68 Cal. App. 4th 1166, 80 Cal. Rptr. 2d 860 (1998), regarding whether a Sheriff acts on behalf of the county or State, even though the *Peters* opinion systematically applied the California Supreme Court's analysis in *Pitts v. County of Kern*, 17 Cal. 4th 340, 70 Cal. Rptr. 2d 823, 949 P.2d 920 (1998), regarding the present legal issue but relating to the office of District Attorney. The Ninth Circuit Court of Appeals opinion in *Brewster*, therefore, is contrary to California law, as interpreted by California Courts and is also contrary to this Court's analysis and holding in *McMillian*. For all of the foregoing reasons, this Court is respectfully requested to grant the Petition for Writ of Certiorari in this matter.

Respectfully submitted,

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